

DISSERTATION

Student: Mr. Justin Sobion

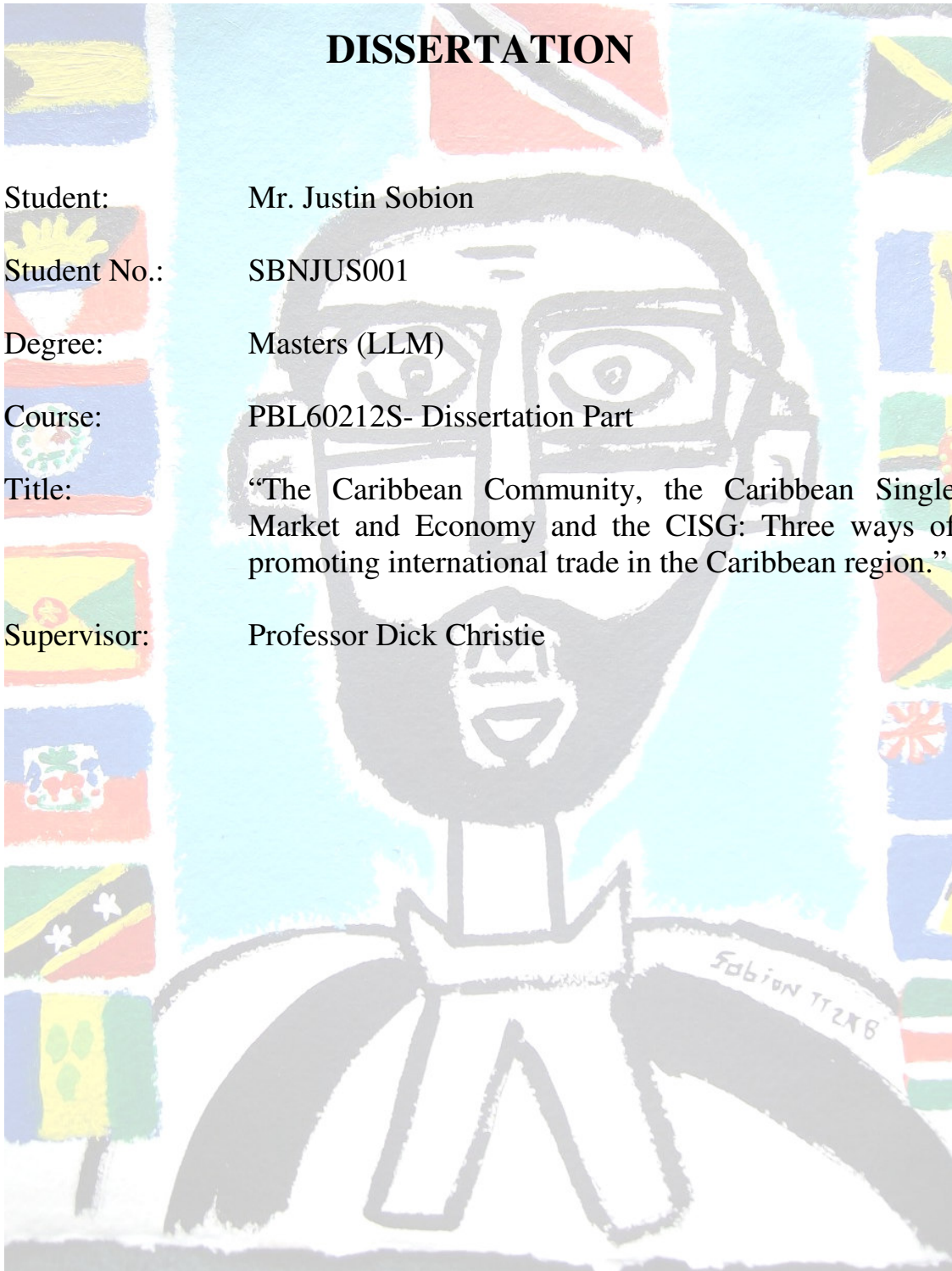
Student No.: SBNJUS001

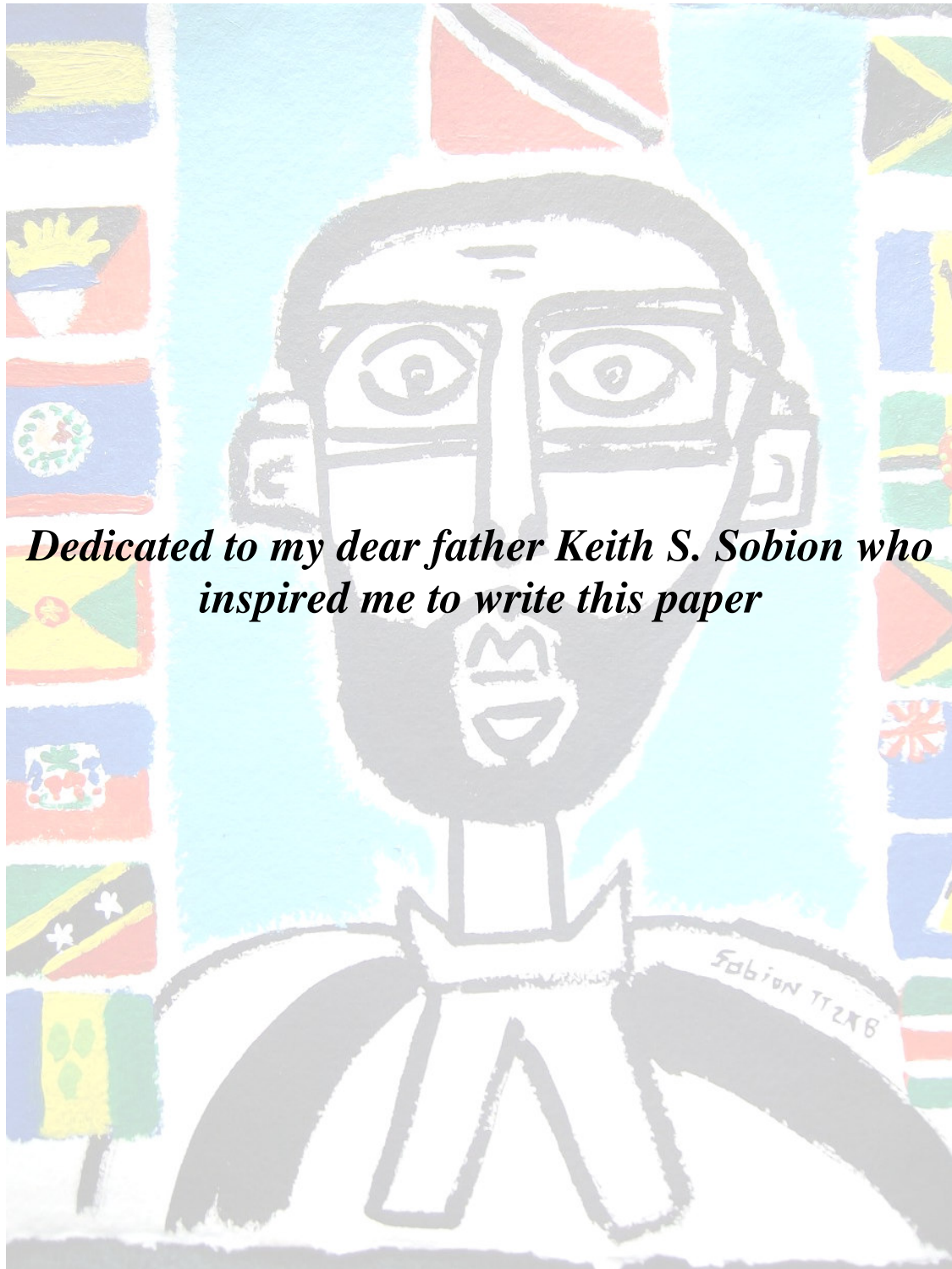
Degree: Masters (LLM)

Course: PBL60212S- Dissertation Part

Title: “The Caribbean Community, the Caribbean Single Market and Economy and the CISG: Three ways of promoting international trade in the Caribbean region.”

Supervisor: Professor Dick Christie





PLAGIARISM DECLARATION

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Masters (LLM) Degree in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of the Masters Dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and this dissertation conforms to those regulations.

Signature:

Date:

| | |
|---|-----------|
| FOREWORD: PURPOSE OF DISSERTATION | 1 |
| CHAPTER 1 | 2 |
| INTRODUCTION TO THE CARIBBEAN COMMUNITY | 2 |
| 1.1 MEMBER STATES | 2 |
| 1.2 HISTORY OF THE CARIBBEAN COMMUNITY (CARICOM)..... | 3 |
| 1.3 WEST INDIES FEDERATION | 5 |
| 1.4 CARIBBEAN FREE TRADE ASSOCIATION | 6 |
| 1.5 OBJECTIVES OF CARICOM | 8 |
| 1.6 PILLARS OF THE COMMON MARKET | 9 |
| 1.6.1 Customs Union: | 9 |
| 1.6.2 Common External Tariff: | 10 |
| 1.6.3 Harmonised scheme of fiscal incentives to industry: | 13 |
| 1.6.4 Common Policy on Foreign Investment: | 14 |
| 1.7 THE DEMOGRAPHICS AND RESOURCES OF CARICOM | 15 |
| 1.7.1 Population and area space of CARICOM: | 15 |
| 1.7.2 Strategic Location: | 16 |
| 1.7.3 CARICOM's Resources: | 17 |
| 1.7.4 The CARICOM Banana and the European Partnership Agreement: | 18 |
| 1.8 OTHER FORMS OF REGIONAL INTEGRATION | 19 |
| 1.9 REGIONAL INTEGRATION-WORK IN PROGRESS | 20 |
| 1.9.1 CARICOM Passport: | 21 |
| 1.9.2 A CARICOM single currency: | 22 |
| 1.9.3 CARICOM Single Market and Economy and the Caribbean Court of Justice: | 22 |
| CHAPTER 2 | 23 |
| THE CARICOM SINGLE MARKET AND ECONOMY (CSME)..... | 23 |
| 2.1 INTRODUCTION TO THE CSME AND THE REVISED TREATY OF CHAGUARAMAS .. | 23 |
| 2.2 THE CSME AND FREEDOM OF MOVEMENT | 26 |
| 2.2.1 Free movement of goods: | 26 |
| 2.2.2 The Right of Establishment: | 27 |
| 2.2.3 Freedom of movement of skilled labour: | 28 |
| 2.2.4 Freedom of movement of capital: | 30 |
| 2.2.4.1 The Regional Stock Exchange: | 32 |
| 2.2.4.2 Currency Convertibility: | 33 |
| 2.2.4.3 Foreign Exchange controls: | 34 |
| 2.2.4.4 Avoidance of Double Taxation: | 35 |
| 2.2.5 Freedom of Movement of Services: | 36 |
| 2.3 THE COMPETITION COMMISSION | 37 |
| 2.4 OVERVIEW OF THE CSME | 39 |
| 2.5 THE CSME AND THE EUROPEAN SINGLE MARKET | 40 |
| 2.6 PREFERENTIAL TRADE ARRANGEMENTS OUTSIDE THE CSME | 42 |
| 2.6.1 CARICOM-Dominican Republic Free Trade Agreement: | 42 |
| 2.6.2 CARICOM-Cuba Diplomatic Relations and Free Trade Agreement: | 42 |
| 2.6.3 CARICOM-COSTA RICA Free Trade Agreement: | 44 |
| 2.6.4 CARICOM-CANADA Free Trade Agreement: | 45 |
| 2.6.5 Proposed Free Trade arrangement between CARICOM and MERCOSUR: | 46 |
| 2.6.6 CARICOM-PetroCaribe Energy Initiative: | 47 |

| | |
|---|-----------|
| CHAPTER 3 | 50 |
| THE CARIBBEAN COURT OF JUSTICE..... | 50 |
| 3.1 INTRODUCTION TO THE CARIBBEAN COURT OF JUSTICE..... | 50 |
| 3.2 THE CCJ AS AN INTERNATIONAL TRIBUNAL | 53 |
| 3.3 THE CCJ AND THE EUROPEAN COURT OF JUSTICE | 55 |
| 3.4 THE CCJ, THE CSME AND THE PROMOTION OF LEGAL CERTAINTY | 56 |
| 3.5 THE CCJ AND THE DOCTRINE OF STARE DECISIS | 58 |
| 3.5.1 <i>The House of Lords Practice Statement and the approach of the Privy Council on binding precedents:</i> | 59 |
| 3.5.2 <i>A further look at the doctrine of stare decisis and its place in international law:</i> | 61 |
| 3.6 LOCUS STANDI AND ACCESS TO THE CCJ BY PRIVATE ENTITIES..... | 63 |
| 3.7 REFERRALS TO THE CCJ BY A NATIONAL COURT: | 66 |
| 3.8 OVERVIEW OF THE CCJ | 69 |
| CHAPTER 4 | 70 |
| THE LAW GOVERNING THE CARICOM CONTRACT AND THE IMPLEMENTATION OF THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS..... | 70 |
| 4.1 THE RULES OF PRIVATE INTERNATIONAL LAW AND THE LAW GOVERNING THE CARICOM CONTRACT | 70 |
| 4.1.1 <i>Express choice of law by the parties:</i> | 71 |
| 4.1.2 <i>Choice of law not expressed by the parties:</i> | 72 |
| 4.1.3 <i>The Seat of the Arbitration – The JAMBAN/Supermarché example:</i> | 73 |
| 4.2 THE MODERN LEX MERCATORIA | 75 |
| 4.2.1 <i>A brief history of the modern lex mercatoria:</i> | 75 |
| 4.2.2 <i>The lex mercatoria and the UNIDROIT Principles:</i> | 75 |
| 4.2.3 <i>The lex mercatoria and English case law:</i> | 77 |
| 4.2.4 <i>The lex mercatoria and the Revised Treaty of Chaguaramas:</i> | 82 |
| 4.3 AN INTRODUCTION TO THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1980 (CISG) AND ITS MEMBER STATES | 82 |
| 4.3.1 <i>A look at some provisions of the CISG:</i> | 84 |
| 4.3.1.1 PART I: Sphere of Application and General Provisions | 84 |
| 4.3.1.1 (a) The Article 95 reservation..... | 86 |
| 4.3.1.1 (b) General Provisions | 88 |
| 4.3.1.2 PART II: Formation of the Contract..... | 90 |
| 4.3.1.2 (a) Acceptance by Post | 90 |
| 4.3.1.2 (b) Irrevocable offers | 91 |
| 4.3.1.3 Avoidance and fundamental breach under the CISG..... | 92 |
| 4.3.1.3 (a) Late delivery by seller | 93 |
| 4.3.1.3 (b) Late Performance (payment/taking delivery) by the buyer: | 95 |
| 4.4 FINAL ANALYSIS | 97 |

Foreword: Purpose of Dissertation

The purpose of this dissertation is to provide the reader with some insight into to the Caribbean Community (CARICOM), its Single Market and Economy and the Caribbean Court of Justice. This dissertation will then culminate by addressing the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) and the benefits of CARICOM countries in implementing same. This dissertation is divided into 4 Chapters. Chapter 1 will introduce the reader to the history, purpose and objections of CARICOM. Chapter 2 will introduce the concept of the Caribbean Single Market and Economy (CSME) and how it works in the Caribbean model. Chapter 2 will also discuss the existing preferential trade arrangements between CARICOM and other States. Chapter 3 considers the recently inaugurated Caribbean Court Justice (CCJ) and its instrumental role as an international law tribunal in interpreting the Treaty establishing the CSME. Chapter 4 will then discuss the law governing the CARICOM contract, and the question as to whether the CARICOM nations have accepted the concept of a *lex mercatoria* (transnational law). Focus will then be placed on the need for CARICOM nations to implement the CISG. It is desired that this dissertation would prove to be interesting and informative not only to the CARICOM reader but also readers from other parts of the world.

CHAPTER 1

INTRODUCTION TO THE CARIBBEAN COMMUNITY

1.1 MEMBER STATES

The Caribbean Community is a regional integration movement comprising of 15 member States. These Member States are Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, the Republic of Guyana, the Republic of Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, the Republic of Suriname and the Republic of Trinidad and Tobago.¹ Thirteen of these member States are English speaking and comprise what is known as the “English-speaking Caribbean”. Suriname is the sole Dutch-speaking Member State while Haiti is the sole French-speaking.

In addition to the 15 core Member States, there are five Associate Members of the Caribbean Community namely Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands and the Turks and Caicos Islands. Seven other States enjoy Observer status of the Caribbean Community’s affairs. These States are Aruba, Columbia, Dominican Republic, Mexico, Netherlands Antilles, Puerto Rico and Venezuela.² The countries which have Observer status are drawn from Latin America and the Dutch-speaking Caribbean.

Having said this, it is noted that the Caribbean Community has a diverse membership. This diversity springs from a combination of geographical location and language. In terms of geography, 12 of the 15 Member States are islands situated in the Caribbean Sea. There are three continental countries: Belize, Guyana, and Suriname. Guyana and Suriname are located on the northern part of the South American

¹ CARICOM Secretariat, “CARICOM: Our Caribbean Community An Introduction” Chapter 1, pg. 4.
See also: http://en.wikipedia.org/wiki/Caribbean_Community

² See: http://en.wikipedia.org/wiki/Caribbean_Community

continent. Belize (formally British Honduras) on the other hand, is situated on the Central America continent facing the Caribbean Sea. Despite their geographical displacement from the Caribbean Sea, Guyana, Suriname and Belize are considered to be, both culturally and politically, part of the Caribbean.

In terms of diversity of language, the Caribbean Community is indeed a multilingual entity with languages comprising of English, Dutch and French.³ Countries such as Suriname (Dutch speaking) and Haiti (French speaking), maintain a civil law legal system. Guyana, which once had a Dutch colonial past, still applies Roman Dutch Law in the law of real property.⁴

The Caribbean Community is essentially an association of sovereign States.⁵ Fourteen of the member States of the Caribbean Community are sovereign States which have experienced movements from colonialism to self-government and independence. There is however one exception in Montserrat which up to today remains a British dependent territory.⁶

1.2 HISTORY OF THE CARIBBEAN COMMUNITY (CARICOM)

In November 1972, the Heads of Government of Caribbean States met in Chaguaramas, Trinidad, to establish new and appropriate structures to strengthen regional integration.⁷

³ Some countries have their own indigenous dialect. For example in Haiti the majority of the population speaks French Creole (“broken French”). In Jamaica some people speak Patois. In Trinidad and Tobago Patois and traces of French Patois are also found and spoken.

⁴ Rt. Hon. Mr. Justice de la Bastide, President of the Caribbean Court of Justice, “The Caribbean Court of Justice as a Regional Court,” paper presented at Managua, Nicaragua, October 2007. Paper is available at:

http://www.ccj.org.ni/press/conferencias/01_CARICOM%20%20MR.%20JUSTICE%20MICHAEL%20de%20la%20BASTIDE_TC.pdf

⁵ Duke E. Pollard, “The Caribbean Court of Justice – Closing the Circle of Independence” pgs. 45 and 90.

⁶ Supra. “CARICOM: Our Caribbean Community An Introduction” Chapter 1, pg. 5. See also: <http://en.wikipedia.org/wiki/Montserrat>

⁷ Supra. “CARICOM: Our Caribbean Community An Introduction” Chapter 2, pg. 50.

At that meeting the Heads of Government decided to create the Caribbean Community and Common Market (CARICOM).⁸ CARICOM was thereby established by the Treaty of Chaguaramas which was signed on 4 July 1973 at Chaguaramas, Trinidad.⁹ The first four signatories were Barbados, Jamaica, Guyana and Trinidad & Tobago.¹⁰ The original signatories to the Treaty were Prime Ministers Errol Barrow for Barbados, Forbes Burnham for Guyana, Michael Manley for Jamaica and Dr. Eric Williams for Trinidad and Tobago.¹¹

The Treaty of Chaguaramas, (including its Annex which established the Common Market) actually came into effect on 1 August 1973.¹² Countries such as Belize, Dominica, Grenada, Montserrat, St. Lucia and St. Vincent and the Grenadines became full members of CARICOM on 1 May 1974. In July 1974, Antigua and Barbuda and St. Kitts and Nevis signed the Treaty of Chaguaramas.

In July 1983, The Bahamas became a member of the Caribbean Community but not the Common Market.¹³ Suriname joined CARICOM on 4 July 1995. In July 2002, Haiti was the last country to join CARICOM when it was formally admitted to the Community at the Twenty-Third Meeting of Heads of Government held at Georgetown, Guyana (the location of the CARICOM Secretariat).¹⁴

It is important to note that the Treaty of Chaguaramas was a juridical hybrid consisting of the Caribbean Community, as a separate legal entity from the Common Market which had its own discrete legal personality.¹⁵ Due to this separate legal

⁸ The acronym CARICOM is often used, interchangeably, to refer to the Caribbean Community and the Caribbean Common Market.

⁹ The Treaty was signed on this date in honour of the birthday of the late Norman Washington Manley who was a leading advocate of the West Indian Federation and one of Jamaica's national heroes.

¹⁰ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 2, pg. 51. See also: <http://www.chagdev.com/Pages/Chag-History-Chag%20TreatyCaricom.htm>

¹¹ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 2, pg. 51.

¹² Ibid.

¹³ Ibid.

¹⁴ Haiti had been suspended from CARICOM in 2004 pending the staging of democratic elections in the Caribbean nation, but officially was welcomed back into the organisation after René Prével was elected Haiti's president on 7 February 2006. See also article: "Inter-American Official Hails International Support for Haiti" dated 6 July 2006. This article is available at: <http://www.america.gov/st/washfile-english/2006/July/200607061130371xeneerg0.9372827.html>

¹⁵ See: http://www.caricom.org/jsp/community/original_treaty.jsp?menu=community

identity of the regional Common Market, it was possible for the Bahamas to become a member of the Community in 1983 without joining the Common Market. This meant that Bahamas could participate in all Community matters except those related to the operations of the Common Market (discussed further below).¹⁶

1.3 WEST INDIES FEDERATION

There were a series of historical events which led to the establishment of CARICOM. The first driving force was the probably the introduction of the West Indies Federation.

Since 1932, regional leaders, especially those in the labour movement, began discussing the idea of a Federation of the West Indies.¹⁷ After many years of deliberation, this Federation was actually established in 1958. The ten members of the West Indian Federation comprised of the territories of Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, Montserrat, the then St. Kitts-Nevis-Anguilla, St. Lucia, St. Vincent and Trinidad and Tobago.¹⁸

The Federation was established by the British Caribbean Federation Act of 1956 and its aim was to establish a political union among its members.¹⁹ When the Federation was established, all its members were still colonies of Britain. As a result it was not unusual that the Federal Government was headed by an Executive Governor-General appointed by Britain. Persons and positions reporting to the Executive Governor-General were the Prime Minister, the Cabinet, a Council of State, the House of Representatives and the Senate.²⁰

¹⁶ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 2, pg. 51.

¹⁷ Ibid. pg. 36.

¹⁸ Ibid. pg. 37.

¹⁹ Ibid.

²⁰ Ibid.

The first Governor-General was Lord Hailes of Britain and the Prime Minister was Sir Grantley Adams (who was the Premier of Barbados). The Federal capital was located in Trinidad and Tobago.²¹

However, despite its positive outlook, the Federation did not foster any real economic growth or any free trade among the member countries.²² The Federation soon met an unexpected demise as it faced several problems in relation to disagreements over taxation and central planning policies and the general unwillingness on the part of territorial governments to give up power to the federal government.²³ Coupled with this, Jamaica the largest member, withdrew its participation in the Federation after conducting a national referendum in 1961. This withdrawal then resulted in the famous statement of Dr. Eric Williams, the then Premier of Trinidad and Tobago, that ‘one from ten leaves nought’. Trinidad and Tobago soon followed Jamaica and withdrew from the federal arrangement a short while later. The Federation was short-lived and it eventually collapsed in January 1962.²⁴

1.4 CARIBBEAN FREE TRADE ASSOCIATION

Another fore-runner to CARICOM was the Caribbean Free Trade Association (CARIFTA). In July 1965, the Premiers of Barbados, British Guiana (now Guyana) and the Chief Minister of Antigua announced definite plans to establish a Free Trade Area in the Caribbean.²⁵ On 15 December 1965, these three Governments signed an agreement, at Dickenson Bay Antigua, establishing CARIFTA.²⁶ This agreement became known as the Dickenson Bay Agreement.²⁷ The three Governments however

²¹ Ibid.

²² See: <http://americas.fiu.edu/trade/caricom.htm>

²³ Supra. “CARICOM: Our Caribbean Community An Introduction” Chapter 2, pg. 38.

²⁴ Ibid.

²⁵ Ibid. pg. 40. See also: <http://www.caricom.org/jsp/community/history.jsp?menu=community>

²⁶ Ibid.

²⁷ The Dickenson Bay Agreement establishing CARIFTA is available at: <http://ctrc.sice.oas.org/Trade/CCME/dikson.asp>

decided not to implement the Agreement immediately in order to give the other countries an opportunity to consider membership.²⁸

The Dickenson Bay Agreement therefore actually came into effect on 1 May 1968 with the participation of Antigua and Barbuda, Barbados, Guyana and Trinidad and Tobago.²⁹ At the time the agreement came into effect, three of the four founding countries had already gained independence from Britain. They were Trinidad and Tobago (1962), Barbados (1966) and Guyana (1966). Antigua and Barbuda eventually gained their independence from Britain in November 1981.

The countries which later joined CARIFTA were Dominica, Grenada, St. Kitts-Nevis-Anguilla, St. Lucia and St. Vincent and the Grenadines (1 July 1968). Montserrat and Jamaica joined on 1 August 1968. In 1971, Belize (then British Honduras) joined the Association.³⁰

CARIFTA was intended to encourage a balanced development of the region by:

- Increasing trade among member States;
- Diversifying and expanding the variety of goods and services available for trade;
- Liberalising trade and removing tariffs and quotas on goods produced and traded within the area and
- Ensuring fair competition by setting up rules for all members to follow to protect the smaller enterprises.³¹

In addition to the above, the Dickenson Bay Agreement also sought to ensure, *inter alia*, that the benefits of free trade were equally distributed and that the industrial development of the Less Developed Countries (LDCs) be promoted.³² The LDCs in

²⁸ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 2, pg. 40.

²⁹ See: <http://www.caricom.org/jsp/community/history.jsp?menu=community>

³⁰ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 2, pg. 41.

³¹ Ibid.

³² Ibid.

CARICOM are Antigua, Belize, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent.³³

At the Seventh Heads of Government Conference in October 1972 in Trinidad, Caribbean leaders decided to transform CARIFTA into a Common Market and established the Caribbean Community of which the Common Market would be an integral part.³⁴ The Caribbean Community and the Caribbean Common Market (CARICOM) superseded CARIFTA which ceased to exist on 1 May 1974.³⁵

1.5 OBJECTIVES OF CARICOM

As mentioned in paragraph 1.2 (above) the Treaty of Chaguaramas is comprised of two entities – the Caribbean Community and the Caribbean Common Market (hereinafter referred to as “the Common Market”). According to article 4 (a) of the said Treaty one of the main objectives of the Community is to facilitate economic integration of member States by the establishment of a Common Market Regime.³⁶

The Common Market Regime was modelled on a large extent to the European Economic Community- now the European Union.³⁷ The Common Market is established in Article 1 of the Annex of the Treaty and one of its main objectives is to facilitate the strengthening, co-ordination and regulation of the economic and trade relations among Member States.³⁸ In order to meet this objective, CARICOM has established a Common Trade Policy where its members agree among matters relating to internal and external trade policies.

³³ This distinction was stipulated under article 3 of the Treaty establishing the Caribbean Community. The More Developed Countries (MDCs) are Barbados, Guyana, Jamaica and Trinidad and Tobago. The Treaty of Chaguaramas is available at: http://www.caricom.org/jsp/community/original_treaty-text.pdf.

³⁴ See: <http://www.caricom.org/jsp/community/history.jsp?menu=community>. See also paragraph 1.2 above.

³⁵ See: http://www.caricom.org/jsp/community/original_treaty.jsp?menu=community

³⁶ Treaty available at: http://www.caricom.org/jsp/community/original_treaty-text.pdf. See also “CARICOM: Our Caribbean Community An Introduction” Chapter 3, pg. 62.

³⁷ Supra. “CARICOM: Our Caribbean Community An Introduction” Chapter 3, page 61.

³⁸ See Article 3 of the Annex of the Treaty of Chaguaramas. The Annex to the Treaty is available at: http://www.caricom.org/jsp/community/original_treaty-text.pdf

There are three pillars of the Common Market namely: (a) A Customs Union with a Common External Tariff (CET), (b) a harmonised scheme of fiscal incentives to industry and (c) a common policy on foreign investment.³⁹ This dissertation shall now elaborate on these three pillars below.

1.6 PILLARS OF THE COMMON MARKET

1.6.1 Customs Union:

The creation of a Customs Union usually occurs during economic integration whereby member countries eliminate all tariffs and non-tariffs barriers among themselves and establish a common external tariff on goods from third countries.

In the CARICOM context, a Customs Union was established to create a free trade area between members of the Common Market. However, in order for goods to be qualified to be imported to another member state free of any duty, the particular good had to satisfy particular criteria in relation to the Rules of Origin. These Rules of Origin establish the conditions of eligibility of goods produced within the region so that they may be considered of Common Market origin and thus qualified for preferential treatment.⁴⁰

The members of the Common Market also agreed to apply the same customs duties and other conditions to trade with countries that were not members of CARICOM. These agreed customs duties are set out in a Common External Tariff (CET) which forms the most common trade feature of a Customs Union.

The CET was set up under Part IV of the Annex to the Treaty of Chaguaramas which dealt specifically with CARICOM's Common Protective Policy (CPP). Under Article 31 (1) of the Annex, the member States agreed to "establish and maintain a Common External Tariff in respect of all commodities imported from third countries." It has been argued that the implementation of a CET could stimulate production within

³⁹ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 3, pg. 62.

⁴⁰ "APPENDIX C -- Islands of the Commonwealth Caribbean: The Caribbean Community and Common Market." Article available at: http://lcweb2.loc.gov/frd/cs/caribbean_islands/cx_appnc.html

the Common Market as it provides a competitive advantage to producers within the customs area since they do not have to pay duty on their products.⁴¹

1.6.2 Common External Tariff:

Prior to the establishment of the Common Market, member States in the exercise of their sovereignty had different policies pertaining to the rate of duties and tariffs on imported goods. Quite naturally therefore, one of the initial challenges faced by members of the Common Market was the harmonisation of different levels of customs duties or tariffs charged by the various member States on goods imported from third countries.⁴²

The first difficulty which faced member States was the fact that in June 1968, the smaller Eastern Caribbean territories (namely Antigua and Barbuda, Dominica, Grenada, St. Kitts Nevis-Anguilla, St. Lucia and St. Vincent and the Grenadines) had already committed themselves to a common customs tariff under the Eastern Caribbean Common Market (ECCM) Agreement.⁴³ This common customs tariff was to be agreed upon and implemented within three years from the date of the ECCM Agreement.⁴⁴ Despite this, when the Treaty of Basseterre, establishing the Organisation of Eastern Caribbean States (OECS), came into force in June 1981 the majority of the principles of the Common Market had not yet been put in place.⁴⁵

⁴¹ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 3, pg. 62.

⁴² Ibid. pg. 64.

⁴³ These said States were also members of the West Indies Associated States (WISA) which was established in November 1966. It is noted that the official acronym WISA does not totally tally with the initial letters of the words. It is also noted that a Common Customs Tariff was established under article 7 of the ECCM Agreement.

See also: "The Treaty of Basseterre and the OECS Economic Union" at pgs. 2 and 3. Available at: http://www.sice.oas.org/ctyindex/OECS/Treaty_e.pdf.

⁴⁴ See Article 7 of the ECCM Agreement. The ECCM Agreement was incorporated in Annex I of the Treaty of Basseterre.

⁴⁵ The Treaty of Basseterre established the Organisation of Eastern Caribbean States (OECS). The Treaty was so named in honour of the capital city of St. Kitts and Nevis where it was signed. The seven Governments which signed the Treaty of Basseterre were Antigua, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines. See: "The Treaty of Basseterre and OECS Economic Union," pg. 3.

It is necessary at this point to note that the member countries of the OECS were also members of the ECCM **and** the principal organ CARICOM. Thus, the challenge members of the Common Market encountered was how they were going to harmonise their own CET with that of the ECCM obligations entered into by the various Eastern Caribbean countries.

The Treaty of Chaguaramas attempted to reconcile both regimes by first recognizing that there was an existing integration agreement established in the form of the ECCM.⁴⁶ Having recognized that there was this existing arrangement, there was a need by members of the Common Market to unify the rates of the tariffs under the ECCM and the CET.

Under article 31 of the Annex, it was agreed that the four More Developed Countries (MDCs) namely, Barbados, Guyana, Jamaica and Trinidad and Tobago, would adopt a plan and Schedule for the CARICOM CET.⁴⁷ This CARICOM CET was eventually implemented in 1976 by Guyana, Jamaica and Trinidad and Tobago. Barbados implemented the CET in 1981.⁴⁸

Under the said Annex, it was further agreed that the Eastern Caribbean States would still fulfill their initial ECCM tariff obligations in the interim until a phased in CARICOM CET was implemented.⁴⁹ As a result, a deadline was fixed for 1st August 1981 for the ECCM countries and Belize, to complete the progressive adjustment of the CET.⁵⁰ Montserrat however was granted a deadline of 1st August 1985.

The pace of tariff reform subsequent to the entry into force of the Treaty of Chaguaramas was generally slow. This was primarily as a result of the inability of

⁴⁶ See Article 67 of the Annex to the Treaty establishing the Caribbean Common Market.

⁴⁷ Any further reference to "The Annex" means the Annex under the Treaty establishing the Caribbean Community which came into force on 1st August 1973.

⁴⁸ CARICOM Report: Integration and Regional Programs Department. See page 28 of Report. Available at:

http://www.iadb.org/intal/aplicaciones/uploads/publicaciones/i-CARICOM_Report_1.pdf

⁴⁹ See Article 31 of the Annex under the Treaty establishing the Caribbean Community.

Also see Report published by the UN Economic Commission for Latin America and the Caribbean titled: "The impact of Trade Liberalization and Fluctuations of Commodity Prices on Government Finances: The case of St. Lucia", at pg. 11. This Report is available at:

<http://www.eclac.org/publicaciones/xml/1/10021/carg0586.pdf>

⁵⁰ See Article 31 of the Annex.

CARICOM members States to agree and implement a unified CET.⁵¹ Efforts to unify the rates of the ECCM and the CET adopted by the MDCs during the 1980s therefore failed. Not surprisingly, the tariff deadlines set under the Annex were not met.

After four years of negotiation, on 1 January 1993, member countries adopted a CET for all goods except agriculture. This CET was to be implemented in four phases and was to be completed by 1 July 1998. In the first phase, the initial tariff ceiling was 35 percent. By the time the fourth and final phase was implemented (between January-July 1998) the tariff ceiling was to be reduced to 20 percent.⁵² Due to the sensitive nature of the agricultural sector, a 40 percent tariff rate was applied to non-CARICOM countries.⁵³ At the time of writing, 12 member States have implemented the fourth phase of the CET.⁵⁴

In order to harmonise regional and international trade, CARICOM have been gradually attempting to revise their CET structure. Recently the Secretariat of CARICOM produced to member States a revised structure of the CET based on a 2007 Harmonised System (2007 HS). This 2007 HS was to be put into effect by 1 January 2007.⁵⁵ However to date, Member States had not yet fully implemented this revised structure.⁵⁶

⁵¹ Supra. "The impact of Trade Liberalization and Fluctuations of Commodity Prices on Government Finances: The case of St. Lucia," at pg. 11.

⁵² Caribbean Trade Reference Centre –available at http://ctrc.sice.oas.org/CARICOM/bkgrd_e.asp

⁵³ Mr. James Moss Solomon (President Caribbean Association of Industry and Commerce).

"How to do Business in the Caribbean Community." This article is available at:

<http://www.acs-aec.org/Documents/~Calendar%202007/8th%20Business%20Forum/6%20How%20to%20Do%20Business%20in%20CARICOM%20eng.doc>

⁵⁴ As at May 2007, these Member States are Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Lucia, St. Vincent, Suriname and Trinidad and Tobago. St. Kitts and Nevis are currently taking steps to implement this fourth phase.

⁵⁵ See the Caribbean Community Statistics website at:

<http://www.caricomstats.org/Files/Meetings/SCCS31/Paper10.htm>

⁵⁶ Establishment of the CARICOM Single Market and Economy- Summary of Status of Key elements. Updated on May 2007, by CARICOM's Customs and Trade Policy Unit.

1.6.3 Harmonised scheme of fiscal incentives to industry:

In 1973, CARICOM established an Agreement on the Harmonisation of fiscal incentives to industry (referred to as “the Agreement”).⁵⁷ The rationale and spirit behind the Agreement was to promote a balanced and harmonious development of the Caribbean Community by providing incentives to industries.⁵⁸ These incentives took the form of tax holidays which exempted certain industries from corporate taxes and customs duties.

The Agreement also made way for the implementation of the “Harmonisation of Fiscal Incentives to Industry Scheme” (referred to as “the Scheme”).⁵⁹ The purpose of this Scheme was to encourage the establishment of industries across the Common Market on similar terms and conditions.

It was however recognized from the outset, that if left to the natural stimulus of the market, the bulk of industrial activity would gravitate towards the larger economies (e.g. Jamaica and Trinidad and Tobago) which had an initial industrial base.⁶⁰ Hence there was a special need to balance the spread of industries between the MDCs and the LDCs.⁶¹ In order to do so, a more generous fiscal incentive regime was applied towards the LDCs which permitted them to grant a greater number of years tax holidays than the MDCs.⁶² In addition to this, the fiscal regime also provided that the MDCs will

⁵⁷ http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_fiscalincentives.jsp?menu=secretariat

⁵⁸ See preamble of the Agreement.

⁵⁹ Ibid. See article 1 of the said Agreement.

⁶⁰ Supra. “CARICOM: Our Caribbean Community An Introduction” Chapter 3, pg. 98.

⁶¹ The Preamble of the Agreement on the Harmonisation of Fiscal Incentives to Industry referred to Annex A of the Agreement establishing the Caribbean Free Trade Association which provides: **“Subject to the existing commitments a regional policy of incentives to industry should be adopted as early as possible...bearing in mind the special needs of the less developed countries for preferential treatment such as soft loans.”**

⁶² Ibid. pg. 65 and also Internet Source at:

http://www.caricom.org/jsp/communications/communiques/8hgc_1973_communique.jsp

refrain from granting income tax holidays to an agreed list of industries suitable for location in the LDCs.⁶³

One of the initiatives which were undertaken to stimulate industrial development of the LDCs was the Caribbean Investment Corporation (“the Corporation”). It was first agreed to set up this Corporation in April 1973 after the meeting of the Heads of Government of the Commonwealth Caribbean countries in Georgetown Guyana. The purpose of the Corporation was to proceed “expeditiously” with a programme for the promotion and establishment of industries in the LDCs.⁶⁴

The advantages of the Harmonised Regime are two-fold. From a narrow point of view, it can stimulate industrial development of the LDCs thereby making these industries more competitive within the region. From a broader perspective, as industries become more competitive, this would encourage an increase in trade in both regional and international markets.

1.6.4 Common Policy on Foreign Investment:

A common policy towards foreign investment is important in order to prevent foreign investors from negotiating investment incentives with several Member States.⁶⁵ In this regard, on 21 May 2005, a draft CARICOM Investment Code was considered at the Tenth Meeting of the Council for Finance and Planning (“COFAP”) at Georgetown Guyana. This draft CARICOM Investment Code represents a harmonised regime for the treatment of investment from extra-Regional sources.⁶⁶ This draft CARICOM Investment Code has been since submitted to all Member States for their consideration. Although consultations among Member States have been completed, at the time of

⁶³ Ibid.

⁶⁴ See Paragraph 3 (1) and 3 (2) of the Georgetown Accord. The Georgetown Accord can be found at: http://www.caricom.org/jsp/secretariat/legal_instruments/georgetownaccord.jsp?menu=secretariat

⁶⁵ Supra. “CARICOM: Our Caribbean Community An Introduction” Chapter 3, pg. 62.

⁶⁶ See the opening remarks by H. E. Edwin W Carrington, Secretary-General, Caribbean Community (CARICOM) at the tenth meeting of the Council for Finance and Planning (COFAP). 21 May 2005, Georgetown, Guyana.

Available at: http://www.caricom.org/jsp/speeches/10cofap_carrington.jsp

writing this Code has not yet been fully adopted.⁶⁷ However, once adopted by Member States, foreign investors will have to contend with only one common Regional investment regime, rather than rules pertaining to fourteen (14) different investment jurisdictions.⁶⁸ It is therefore envisaged that a common policy on foreign investment will provide greater inflows from Extra-CARICOM sources.⁶⁹

1.7 THE DEMOGRAPHICS AND RESOURCES OF CARICOM

1.7.1 Population and area space of CARICOM:

When compared to regional trade blocs to the likes of the African Union (AU) and the European Union (EU), the population size of CARICOM is quite small. To date, it is estimated that CARICOM comprises of some 15 million nationals.⁷⁰ Out of this fifteen million people living in the CARICOM region, almost 9 million people live in Haiti alone.⁷¹ Furthermore, besides Haiti, Jamaica and Trinidad and Tobago, the other twelve CARICOM countries each have a population of less than one million persons.

With respect to size, the total area of all the CARICOM territories amount to 462,909 square kilometres.⁷² The total area space of CARICOM is therefore even smaller than the size of France.⁷³

⁶⁷ Supra. Mr. James Moss Solomon, "How to do business in the Caribbean Community"

⁶⁸ Supra. Opening remarks by H. E. Edwin W Carrington, Secretary-General, Caribbean Community (CARICOM)

⁶⁹ Power point presentation by Dr. Maurice Odle, Economic Intelligence and Policy Unit, CARICOM Secretariat. Available at:

http://www.caricom.org/jsp/single_market/caribbean_connect/caricom_investment_code_odle.ppt#1

⁷⁰ "CARICOM and Washington Commission a New Chapter in U.S.-Caribbean Relations" dated 27 July 2007. This Analysis was prepared by the Council on Hemispheric Affairs (COHA) Research Associate Mr. Andrew Carmona and is available at: <http://www.coha.org/2007/07/27/caricom-and-washington-commission-a-new-chapter-in-us-caribbean-relations/>

⁷¹ The estimated population of CARICOM is 15,233,625 persons. See:

http://en.wikipedia.org/wiki/Caribbean_Community

⁷² Supra. "CARICOM: Our Caribbean Community An Introduction" Table 1.1 (Overleaf).

⁷³ The total area space of France is 674,843 square kilometres. This includes all overseas French departments and territories. See: <http://en.wikipedia.org/wiki/France>.

1.7.2 Strategic Location:

Another important factor which must be considered is the fact that CARICOM countries are situated in a strategic part of the Western Hemisphere. CARICOM countries lie south of North America which is the major modern superpower and arguably the world's largest market.⁷⁴ Not only is North America considered to be the Caribbean's closest developed neighbour but it is also the Caribbean's most significant trading partner.⁷⁵

The location of the Caribbean in North America's 'backyard' can prove to be an economic advantage to CARICOM countries as they would be able to benefit from easier access to this large market for their exports and imports.⁷⁶ On the other hand, for North America, the Caribbean region is regarded as geopolitically strategic in terms of security. As a result, the co-operation with CARICOM is essential in combating organised crime, drug trafficking and terrorism.⁷⁷

CARICOM countries are also situated close to Europe and the European Union which is the Community's second largest trading partner.⁷⁸ To the south of CARICOM lies the continent of South America which includes countries such as Venezuela, Costa Rica and Brazil. The geographic proximity to Brazil particularly can also be an added advantage to CARICOM as it is considered to be the largest economy in Latin America.⁷⁹

⁷⁴ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 1, pg. 23.

⁷⁵ Supra. "CARICOM and Washington Commission a New Chapter in U.S.-Caribbean Relations" dated 27 July 2007.

⁷⁶ Ibid.

⁷⁷ Supra. "CARICOM and Washington Commission a New Chapter in U.S.-Caribbean Relations"

⁷⁸ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 9, pg. 346.

⁷⁹ In 2007 Brazil's estimated GDP was \$1.5 trillion U.S.

See: <http://www.chinademands.com/news.jhtml?method=detail&docId=2321272>

1.7.3 CARICOM's Resources:

The CARICOM region has been blessed with an abundance of diverse natural resources. For example, Trinidad and Tobago is rich in oil, natural gas and asphalt.⁸⁰ Trinidad and Tobago therefore attracts investment opportunities in petrochemicals, chemicals, methanol, ammonia, fertilisers and down-stream industries.⁸¹ In countries such as Jamaica, Guyana and Suriname there are vast bauxite reserves.⁸² Countries such as Belize, Dominica, Guyana and Suriname have extensive forests and as such have the potential for forest based industries such as wood and pulp.⁸³ Guyana and Suriname have gold and diamond mines.⁸⁴ Grenada- affectionately known as the 'Spice Isle'- produces one-third of the world's output of spices and is the world's second largest producer of nutmeg after Indonesia.⁸⁵

The region is also known for its well favoured tropical climate. This climate together with the excellent beaches, especially in Antigua, Barbados and Jamaica, are suitable for the development of the tourism industry.⁸⁶ In addition to natural resources, the CARICOM region also possesses skilled human resources. One of the challenges faced by CARICOM therefore is to develop and use both the natural and human resources effectively and in a sustainable manner.

⁸⁰ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 1, pg. 23. In La Brea, a city in the south-west of Trinidad there is a lake of natural asphalt called the Pitch Lake. The Pitch Lake is one of three natural asphalt lakes in the world.

See: http://en.wikipedia.org/wiki/Pitch_Lake

⁸¹ R. Viswanathan "Caribbean: A place in the sun for Indian business" dated 24 April 2007.

Article available at: <http://www.thehindubusinessline.com/2007/04/24/stories/2007042400580800.htm>

Trinidad and Tobago is also the number one producer and exporter of methanol. See:

<http://www.opm.gov.tt/news/index.php?pid=2001&nid=sp060927>

⁸² Ibid.

⁸³ Ibid. See also "CARICOM: Our Caribbean Community An Introduction" Chapter 1, pg. 23

⁸⁴ Supra. R. Viswanathan "Caribbean: A place in the sun for Indian business"

⁸⁵ Supra. "CARICOM: Our Caribbean Community An Introduction" Appendix 1, pg. 416. See also <http://en.wikipedia.org/wiki/Grenada>.

⁸⁶ Ibid. pg. 23

1.7.4 The CARICOM banana and the European Partnership Agreement:

The major banana producing islands in CARICOM are Grenada, Dominica, St. Lucia and St. Vincent (collectively known as the Windward Islands).⁸⁷ Suriname, which is aspiring to become the number one banana producer in the region, produced some 60,000 tonnes in 2007.⁸⁸ These countries have had a longstanding relationship with the EU for preferential treatment of their bananas in the EU market under the Lomé Conventions (1975-1989) and their successor namely: the ACP (Africa Caribbean Pacific)-EU Partnership Agreement.⁸⁹ This Agreement provided for, *inter alia*, bananas originating from ACP States to enter the EU market free from any import duty and tariffs.⁹⁰

In February 1996, the United States and several Latin American banana-exporting countries lodged a legal complaint against the EU's banana export regime claiming that it unfairly restricted the entry of their bananas in the EU's market.⁹¹ The EU has since been called upon by the World Trade Organisation (WTO) to modify its banana regime with the ACP States. CARICOM banana producers are therefore now forced to compete directly for the European market with large producers from Latin America.

The result of such a modification has forced the ACP banana exporting countries to give up guaranteed access for more than 100,000 tonnes of bananas which has since been transferred to Latin American producers.⁹² The CARICOM country which has been severely affected by the modification of the EU's banana regime is Dominica where its export earnings fell from 32.8% in 1997 to 18.9% in 2001.⁹³ The total banana

⁸⁷ See: <http://www.wibdeco.com/Home/tabid/36/Default.aspx>

⁸⁸ "Suriname aiming to become CARICOM's top producer." Article available at: <http://www.caricomblog.com/index.php?itemid=463>

⁸⁹ This is commonly referred to the Cotonou Agreement signed in June 2000.

⁹⁰ "EU races for ex-colony trade deal." Article available at: <http://news.bbc.co.uk/2/hi/europe/7098946.stm>

⁹¹ See: http://www.wto.org/english/thewto_e/minist_e/min05_e/brief_e/brief22_e.htm

⁹² Supra. "CARICOM: Our Caribbean Community An Introduction", Chapter 3, pg. 75

⁹³ Ibid. pg. 76.

exports of the Windward Islands also fell from 123,000 metric tonnes to 82 metric tonnes between the years 2000 to 2004.⁹⁴

Although CARICOM countries are still receiving preferential treatment for their bananas in the EU market, the ACP countries have been given a seven year waiver from the WTO which gives them time to come up with an appropriate deal with the EU. This waiver however expired in December 2007. At the end of last year, the Cariforum group (comprising of CARICOM and Dominican Republic) emerged as the first of the six groups in the ACP bloc to reach a deal under the new European Partnership Agreement (EPA). Under this pact, regional bananas will gain duty-free and quota-free access to the EU starting 1 January 2008.⁹⁵

1.8 OTHER FORMS OF REGIONAL INTEGRATION

There are activities within the region which have strengthened and fostered regional integration. In the arena of sport, the West-Indies cricket team has been one of the first activities which brought the English speaking CARICOM territories together as one functioning unit.⁹⁶

The culture and music of the Caribbean region are also intimately intertwined. Calypso and Reggae are the two major art forms which have been born out of the unique Caribbean experience. Calypso music is a style of Afro-Caribbean music which originated in Trinidad at about the start of the 20th century.⁹⁷ The most famous artistes of this early art-form include the Roaring Lion, the Lord Kitchiner and the Mighty Sparrow.⁹⁸ The popularity of Calypso music has since spread further up the islands and is now fully embraced by countries such as Barbados and Grenada.

⁹⁴ See: http://www.bananalink.org.uk/index.php?option=com_content&task=view&id=59&Itemid=19

⁹⁵ "Caribbean leads partnership pact between Europe, ACP" Daily Observer newspaper, Jamaica, dated 30 January 2008.

⁹⁶ Supra. "CARICOM: Our Caribbean Community An Introduction", Chapter 1, pg. 14

⁹⁷ See: http://en.wikipedia.org/wiki/Calypso_music

⁹⁸ Ibid.

Reggae music is a music genre which was first developed in Jamaica in the early 1960's.⁹⁹ This music, which originated from the Rastafari movement, also became popular both regionally and internationally.¹⁰⁰ In the mid 1970s, one of the first known reggae bands to rise to international stardom was Bob Marley and the Wailers.

As arts and culture play an influential role of the Caribbean society, CARICOM has established the Caribbean Festival of Arts (CARIFESTA) which is a major forum for culture and cultural expression of the Community.¹⁰¹ CARIFESTA brings together entertainers, visual artists and artistes from around the region to showcase their respective talents.¹⁰²

In 1992, CARICOM also introduced the Order of Caribbean Community (OCC) which is a regional award bestowed upon distinguished CARICOM nationals.¹⁰³ Recipients of the OCC include Nobel Prize Winner in literature Derek Walcott (in 1992) of St. Lucia and distinguished Caribbean jurist the late Justice Telford Georges (in 1995) of Dominica.¹⁰⁴

1.9 REGIONAL INTEGRATION-Work in Progress

There are also other forms of Regional Integration which are currently in the CARICOM pipeline. These include the following:

⁹⁹ See: <http://en.wikipedia.org/wiki/Reggae>

¹⁰⁰ The Rastafari movement is a religious and socio-political movement which originated in Jamaica around 1930 after the coronation of His Imperial Majesty Haile Selassie as Emperor of Ethiopia. Members of the Rastafari movement claim the divinity of the Emperor and repatriation to their motherland Africa. Members of the movement can now be found throughout the entire region and also as far as Europe, Africa and Japan.

¹⁰¹ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 4, pg. 178.

¹⁰² CARIFESTA X will take place in Guyana between 22-31 August 2008. For more information see <http://www.carifesta.net/x/index.php>

¹⁰³ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 1, pg. 24.

¹⁰⁴ Ibid. pg. 25.

1.9.1 CARICOM Passport:

In order to facilitate regional integration and the free movement of persons, CARICOM has made plans for the Community to introduce a common passport for CARICOM citizens. Suriname was the first CARICOM country to introduce the passport on 7 January 2005.¹⁰⁵ At the time of writing, ten of the fifteen CARICOM states have since issued passports. These states are Antigua and Barbuda, Barbados, Dominica, Grenada, Guyana, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago. The expectation is that all the member states will introduce the CARICOM passport by 2008 when the stock of their old passports is depleted.¹⁰⁶

Besides being a symbolism of regionalism, the introduction of the CARICOM passport is also part of the measures to promote hassle-free travel for CARICOM nationals.¹⁰⁷ In this regard, it is pleasantly noted that countries such as Belize, Grenada, Guyana and Suriname have implemented the decision to allow CARICOM Nationals travelling to other Member States to be granted a definite entry of 6 months.¹⁰⁸

The cover of the passport will have the logo of CARICOM and the words "Caribbean Community". The Coat of Arms and the name of the Member State are also featured on the cover.¹⁰⁹ In this respect the CARICOM passport would have similar features as the passports issued in the countries which form part of the European Union.

¹⁰⁵ "Suriname introduces CARICOM Passport" dated 12 January 2005. Article available at: <http://www.caribbeannetnews.com/2005/01/12/passport.shtml>

¹⁰⁶ See: http://en.wikipedia.org/wiki/Caribbean_Community

¹⁰⁷ See: http://www.caricom.org/jsp/single_market/travel.jsp?menu=csme

¹⁰⁸ This is subject to the right of Member States to reject undesirable persons. Such a move was welcomed by Heads of Government of CARICOM at the 19th Inter-Sessional Meeting on 7-8 March 2008, Nassau, Bahamas.

¹⁰⁹ Ibid.

1.9.2 A CARICOM single currency:

CARICOM countries such as Bahamas, Barbados, Belize, Guyana, Haiti, Jamaica, Suriname and Trinidad and Tobago utilise their own single currency. The other seven countries which form part of the OECS, share a common currency which is called the EC (Eastern Caribbean) dollar. The countries with the strongest exchange rate are Bahamas, Barbados, Belize and the OECS States.¹¹⁰

Just like the EU has done, there have been recent moves made by CARICOM to establish a single currency among its member states.¹¹¹ Drawing on the Euro implementation process, a common currency in the Caribbean may probably take several years to be fully and successfully adapted to the daily use of all the islands.¹¹² CARICOM therefore has the advantage of learning from and retrospectively observing the manner in which the EU countries have implemented and adopted their single currency. At the end of the day, the role of a CARICOM single currency will undoubtedly deepen regional and economic development among member states.

1.9.3 CARICOM Single Market and Economy and the Caribbean Court of Justice:

The establishment of a CARICOM Single Market and Economy and a Caribbean Court of Justice are two other methods of regional integration which are currently in the process of being implemented and finalised. These methods will be further discussed in detail in Chapters 2 and 3 respectively.

¹¹⁰ At the time of writing, the exchange rates with the US\$ are as follows: 1US \$ = \$0.9975 BSD (Bahamas dollar), 1 US \$ = \$1.99 (Barbados), 1 US \$ = \$ 1.97 (Belize), 1 US \$ = \$ 2.69 EC (OECS). See:

<http://finance.yahoo.com/currency/convert?amt=1&from=USD&to=BBD&submit=Convert>

¹¹¹ The Euro was formally established as a unit of exchange on 1 January 1999. Euro bank notes and coins actually entered into circulation on 1 January 2002.

¹¹² Supra. "CARICOM and Washington Commission a New Chapter in U.S.-Caribbean Relations" dated 27 July 2007.

CHAPTER 2

The CARICOM Single Market and Economy (CSME)

2.1 INTRODUCTION TO THE CSME AND THE REVISED TREATY OF CHAGUARAMAS

The CARICOM Single Market and Economy also known as the Caribbean Single Market and Economy or CSME is an integrated development strategy which was first envisioned at the 10th Meeting of the Conference of CARICOM Heads of Government in July 1989 in Grand Anse, Grenada.¹¹³ The CSME was therefore inspired by what became known as the ‘Grand Anse Declaration’ which sought to deepen the integration process of the Caribbean Community in order for it to be better able to respond to the challenges and opportunities presented by globalisation.¹¹⁴ On 5 July 2001, 12 years after the Grand Anse Declaration, the Heads of Government signed the Revised Treaty of Chaguaramas (“**Revised Treaty**”) which provided the legal framework upon which CSME was to be established.¹¹⁵ The CSME is the regime which is a successor to the regime established under the original Treaty of Chaguaramas (1973): which established the Caribbean Community and the Common Market.¹¹⁶

The CSME is therefore an economic arrangement that will allow CARICOM goods, services, people and capital to move throughout CARICOM without tariffs and restrictions to achieve a single economic space. Its aim is to further harmonise

¹¹³ “History of the CARICOM Single Market and Economy” CSME Unit Trinidad and Tobago website: <http://www.csmeff.com/content2/csme/history/csme.shtml>

¹¹⁴ Supra. “CARICOM: Our Caribbean Community An Introduction,” Chapter 5, pg. 222 and Chapter 6 at pg. 243.

¹¹⁵ The Revised Treaty of Chaguaramas establishing the Caribbean Community including the Single Market and Economy was signed on 5 July 2001 at the twenty-second meeting of Heads of Government in Nassau Bahamas.

¹¹⁶ Duke E. E. Pollard, “The CCJ and the CSME” at pg.1. This paper is available at: <http://www.caribbeancourtjustice.org/speeches/pollard/01-The%20CCJ%20and%20the%20CSME.pdf>

economic, monetary and fiscal policies and measures across all CARICOM Member States.¹¹⁷ The CSME therefore creates a single economic space which will support competitive production in CARICOM for both the intra-regional and extra-regional markets.¹¹⁸

Essentially the CSME comprises of two main components: the Single Market and the Single Economy.¹¹⁹ The first component: the Caribbean Single Market (CSM) was initially implemented on 1 January, 2006 by six Member States namely, Barbados, Belize, Guyana, Jamaica, Suriname and Trinidad and Tobago.¹²⁰ Six of the nine member OECS States officially signed onto the CSM on 3 July, 2006. These States are Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines.¹²¹ As a result, there are currently 12 members of CARICOM which are full members of the CSM. These 12 Member States have already enacted the Revised Treaty into their domestic laws.

The CARICOM countries which are not yet part of the CSM are Bahamas, Haiti and Montserrat. The Bahamas and Haiti have not yet acceded to the Revised Treaty and therefore they are not a participant to the CSME. As Montserrat is a crown colony, it is currently awaiting approval, (in the form of a Deed of Entrustment) from the United Kingdom with regards to the Revised Treaty in order to participate in the CSM.¹²² In this regard, the Chief Premier, Dr. Lowell Lewis is optimistic that

¹¹⁷ "CSME Overview" available at Ministry of Foreign Affairs of Trinidad and Tobago website:

<http://foreign.gov.tt/pages/csme.php>

¹¹⁸ Edwin W. Carrington, "The Challenges of Globalisation: The CARICOM Response- The CSME, The Caribbean Court of Justice and the Role of Public Servants within the Process." This Article is found in "The Caribbean Court of Justice- Issues and Perspectives (2001) Vol. 1 pg. 1.

¹¹⁹ Presentation by H.E. Jerry Narace Ambassador Extraordinary and Plenipotentiary and Head CSME Unit to the Tobago House of Assembly on The CARICOM Single Market and Economy on 7 December 2005. This presentation is available at:

http://www.csmett.com/content2/csme/presentations/Presentation_by_H_E_Jerry_Narace_Ambassador_Extraordinary_Plenipotentiary_and_Head_CSME_Unit_to_The_Tobago_House_of_Assembly_on_The_CARICOM_Single_Market_and_Economy.shtml

¹²⁰ Ibid.

¹²¹ "CARICOM Summit- Haiti welcomed back." Article in Jamaica Gleaner Newspaper dated 5 July 2006. See: <http://www.jamaicagleaner.com/gleaner/20060705/carib/carib1.html>

¹²² Supra. "History of the CARICOM Single Market and Economy" See: <http://www.csmett.com/content2/csme/history/csme.shtml>

Montserrat will become fully integrated in the CSM by March 2008: in time for the next meeting of the Heads of Government of CARICOM.¹²³

The Single Economy is the second component of the CSME. The Revised Treaty envisages the Single Economy as an arrangement that would further harmonise economic, monetary and fiscal policies across all Member States of the Caribbean Community.¹²⁴ At the 18th Inter-Sessional CARICOM Heads of Government Conference in St. Vincent and the Grenadines in February 2007, it was agreed that the framework for the Single Economy the second component of the CSME, would be on target for a 2008 schedule.¹²⁵ At the same meeting, CARICOM Heads of Government further agreed to accept a recommendation report on the CSME which suggested a phased in implementation of the Single Economy.¹²⁶ As a result, the CARICOM Heads of Government have agreed to fully implement the Single Economy component on a phased in basis by 2015 and allow for the full free movement of the Community's nationals by 2009.¹²⁷

The full implementation of the Single Economy, will take place in two phases. The first phase will take place between 2008 and 2009.¹²⁸ This phase will consist of a consolidation of the Single Market with the initiation of the Single Economy. Its main elements will include, *inter alia*, the establishment of a Regional Stock Exchange, the approval of a CARICOM Investment Regime and an agreement among the Central Banks on a common CARICOM currency (see paragraph 1.9.2).¹²⁹ The second phase takes place between 2009 and 2015 and consists of the consolidation and completion of

¹²³ "Montserrat making CARICOM Single Market pitch" CANA news, 14 December 2007. See: <http://www.cananews.net/news/131/ARTICLE/19154/2007-12-14.html>

¹²⁴ Supra. Presentation by H.E. Jerry Narace Ambassador Extraordinary and Plenipotentiary and Head CSME Unit to the Tobago House of Assembly on The CARICOM Single Market and Economy on 7 December 2005.

¹²⁵ "Full free movement of Caribbean nationals by the year 2009." Article available in the Jamaica Gleaner Newspaper dated 16 February 2007.

See: <http://www.jamaica-gleaner.com/gleaner/20070216/carib/carib1.html>

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ See: http://en.wikipedia.org/wiki/CARICOM_Single_Market_and_Economy#_note-Full_free_movement_of_Caribbean_nationals_by_the_year_2009

¹²⁹ Ibid.

the Single Economy. Some of the main features of the second phase include- the harmonisation of fiscal and monetary policies, the implementation of a CARICOM Monetary Union and the Implementation of a Regional Competition Policy (see paragraph 2.3 below) and a Regional Intellectual Property Regime.¹³⁰

2.2 THE CSME AND FREEDOM OF MOVEMENT

The Single Market component of the CSME is comprised of five main regimes. These are the freedom of movement of goods, services, skilled labour (persons), capital and the right of establishment.¹³¹

2.2.1 Free movement of goods:

As we have seen in paragraph 1.2, prior to the establishment of the CSME, there existed a Regional Common Market. While the primary focus of this Common Market was on liberalising trade in goods among its members, the CSME now expands its horizons to include the free movement of services, capital, skilled labour and the freedom to establish business enterprises anywhere in the Community.¹³² As a result, prior to the introduction of the CSME, a single market for goods already existed among Member States under the Common Market. Due to this, it is estimated that more than 95 per cent of the goods produced within the Region move freely across the Community.¹³³ Besides promoting intra-regional trade, the free movement of goods has also stimulated international trade.¹³⁴

¹³⁰ Norman Girvan, "Towards a Single Economy and a Single Development Vision" Available at: http://www.oas.org/Conferenceonthecaribbean/Portals/0/Documents/General/Girvan_Towards_SEconomy_Final.pdf

¹³¹ Supra. Presentation by H.E. Jerry Narace Ambassador Extraordinary and Plenipotentiary and Head CSME Unit to the Tobago House of Assembly on The CARICOM Single Market and Economy.

¹³² Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 6, pg.243.

¹³³ Ibid.

¹³⁴ Address by His Excellency Jerry Narace, Ambassador Extraordinary and Plenipotentiary Head, CSME Unit dated 22 March 2007. Address available at: http://www.csmett.com/content2/csme/speeches/labour_administration.shtml

With the advent of the Revised Treaty and the CSME, energies are now focused on the removal of restrictions on the other four regimes namely: the right of establishment, the free movement of skilled labour, capital and services. These four regimes are specifically dealt with under Chapter Three of the Revised Treaty.

2.2.2 The Right of Establishment:

One of the key objectives of the CSME is to enable businesses to operate freely within the Region.¹³⁵ As a result, the Revised Treaty provides for the right of establishment which permits the freedom of nationals from any Member State to establish enterprises throughout the Community.¹³⁶ When establishing such a right of establishment, a CARICOM national is to be treated no less favourably than a national of the particular country in which the establishment is taking place.¹³⁷

Article 32 is the specific provision under the Revised Treaty which grants the right to persons, companies and other legal entities (such as partnerships) to establish a commercial presence within the Caribbean Community.¹³⁸ Article 32 (1) of the Revised Treaty expressly prohibits the introduction by Member States of any **new** restrictions relating to the right of establishment of nationals of other Member States. In addition to this, Member States are also obliged under the Revised Treaty to notify CARICOM's Council for Trade and Economic Development (COTED) of any existing restrictions on the right of establishment with respect to nationals of other Member States.¹³⁹

This right of establishment is two fold. Firstly, it includes the right to engage in any **non-wage earning activities** of a commercial, industrial, agricultural, professional or artisanal nature.¹⁴⁰ The term "non-wage earning activities" under the Revised Treaty

¹³⁵ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 6, pg. 248.

¹³⁶ Supra. Edwin W. Carrington, "The Challenges of Globalisation: The CARICOM Response- The CSME, The Caribbean Court of Justice and the Role of Public Servants within the Process" at pg. 4.

¹³⁷ Ibid.

¹³⁸ See Article 32(5) (a) of the Revised Treaty which defines "a person".

¹³⁹ See Article 32(2) of the Revised Treaty.

¹⁴⁰ See Article 32(3) (1) (a) of the Revised Treaty.

means activities undertaken by self-employed persons within the Caribbean Community.¹⁴¹ Secondly, the Revised Treaty establishes the right to create and manage **economic enterprises** which includes any type of profitable organisation which produces, trades or provides goods and services and which is owned or controlled by a person, company or other legal entity of a Member State.¹⁴² Accordingly, CARICOM Nationals wishing to establish a commercial presence under the CSME are allowed, inter alia:

- Ease of entry to establish a commercial presence and indefinite stay to do so;
- Ease of administration for the registering and/or incorporation of companies;
- Access to capital in the receiving member state;
- Access to land, buildings and other property for purposes directly related to the establishment of a business and
- Freedom of entry for managerial, supervisory and technical staff and spouses and immediate dependent family members.¹⁴³

Presently, the right of establishment is operational subject to the rules and regulations governing the establishment of businesses in each respective Member State. With the coming on stream of a harmonised Companies legislation, companies and other business entities will be able to move to another Member State and establish a business presence without the need for re-incorporation or registration.¹⁴⁴

2.2.3 Freedom of movement of skilled labour:

The freedom of movement of skilled labour is deemed to be a critical element of the Single Market component of the CSME. The CSME allows for CARICOM

¹⁴¹ See Article 32(3) (2) of the Revised Treaty.

¹⁴² See Article 32 (5) (b) of the Revised Treaty.

¹⁴³ Supra. Presentation by H.E. Jerry Narace Ambassador Extraordinary and Plenipotentiary and Head CSME Unit to the Tobago House of Assembly on The CARICOM Single Market and Economy on 7 December 2005.

¹⁴⁴ Ibid.

Nationals to seek work or engage in gainful employment in all participating Member States as either a wage earner or non-wage earner without the need to obtain a work permit in the receiving Member State.¹⁴⁵ To emphasise the importance of such a freedom, Article 45 of the Revised Treaty states:

*“Member States commit themselves to the goal of free movement of their nationals within the Community.”*¹⁴⁶

In order to achieve the goal of the freedom of movement of CARICOM nationals within the Community, Article 46 of the Revised Treaty lists the categories of persons who are entitled to move and work freely within the Community. Such persons are: university graduates, media workers, sportspersons, artistes and musicians. Thus, for example, it is envisioned under the CSME that a Reggae musician from Jamaica would be able to perform at a concert in Grenada without obtaining a prior work permit.¹⁴⁷

Article 46(2) of the Revised Treaty, also imposes a positive duty on Member States to “establish appropriate legislative, administrative and procedural arrangements” to facilitate the movement of skilled nationals from one Member State to the next. One example of such a legislative arrangement can be found under the Immigration (Caribbean Community Skilled Nationals) Act of 1996 of Trinidad and Tobago.¹⁴⁸ The purpose of this Act is to remove the restrictions on entry into Trinidad and Tobago of skilled nationals of qualifying Caribbean Community countries.¹⁴⁹

Under section 7 (1) of this Act, the Minister of Foreign Affairs (who is responsible for CARICOM affairs) is mandated to issue a Certificate of Recognition of Caribbean Community Skills Qualification (Certificate of Recognition) to citizens of Trinidad and Tobago or another CARICOM State once they satisfy particular qualification

¹⁴⁵ Ibid.

¹⁴⁶ The “Community” means the Caribbean Community and includes the CSME established under the Revised Treaty. See Article 1 of the Revised Treaty.

¹⁴⁷ See Article 46 (2)(b)(ii) of the Revised Treaty.

¹⁴⁸ Chapter 18:03, Laws of Trinidad and Tobago issued in 2006.

¹⁴⁹ See Preamble of Act.

requirements under the Act. Originally, this Act provided for the issuance of Certificates of Recognition to university graduates to allow them to move without restriction in and out of Trinidad and Tobago.¹⁵⁰ However, in June 2003, the Act was amended to add the four additional categories – media workers, sports persons, artistes and musicians.¹⁵¹

To date, all 12 Member States who are party to the CSME, have legislation in place for the free movement of university graduates, artistes, media workers, musicians and sports persons.¹⁵² The last country to complete the legislative process was Antigua and Barbuda. In October 2007, Antigua and Barbuda's Parliament approved the Caribbean Community (CARICOM) Skilled Nationals (Amendment) Act which paved the way for the free movement of the five categories of workers.¹⁵³

2.2.4 Freedom of movement of capital:

Another important feature of the CSME is that it permits the free movement of capital across the region. In order to facilitate the free movement of capital, Member States undertook to remove discriminatory restrictions on banking, insurance and other financial services.¹⁵⁴ Thus, the free movement of capital would allow CARICOM Nationals to:

- transfer money to another Member State on the same basis as a National of the Member State from which the money is being sent;

¹⁵⁰ Supra. "CSME Overview" available at: <http://foreign.gov.tt/pages/csme.php>

¹⁵¹ Section 5 of the Immigration (Caribbean Community Skilled Nationals) (Amendment) Act No. 18 of 2003.

¹⁵² Leela Ramoutar-Narinesingh, "Status of Implementation of the CARICOM Single Market and Economy: Presentation at the Caribbean Annual Private Sector Meeting 10 June 2006, Bridgetown, Barbados." Available at CARICOM website: http://www.caricom.org/jsp/single_market/csme_implementation.jsp

¹⁵³ "Antigua approves free movement of CARICOM nationals" Article dated 18 October 2007 is available at: http://www.antiguabarbuda.net/latestnews/latest_10_18_077.htm

¹⁵⁴ See Article 38 (1) of the Revised Treaty. Also see Duke Pollard, "The Caribbean Court of Justice-Closing the Circle of Independence" pg. 116.

- Have equal rights to buy stocks and shares and freely move capital from one Member State to another;
- Have access to a wider source of capital with the potential of lowering costs in national markets, thus reducing the cost of capital;
- Diversify investment portfolios and to invest in best performing stocks and shares across the region at lower costs.¹⁵⁵

The arrangements for the free movement of capital can be divided into two elements, namely movement for the purpose of **investment** and movement for **current payments**.¹⁵⁶ As we have seen, the free movement of capital for the purpose of investment enables any CARICOM national to move freely and invest money in any country within the CSME area. This provision therefore assists businesses in mobilising capital from across the entire CARICOM region and allows investors to choose where they prefer to invest or save their money.¹⁵⁷ On the other hand, the free movement for current payments provides for the free movement of money to pay for the purchase of goods and services from another member State.¹⁵⁸

Article 40 (1) of the Revised Treaty mandates all Member States to remove restrictions on the movement of capital and current payments. Capital payments and transfers include, *inter alia*, equity and portfolio investments, short-term bank and credit transactions and dividends and other income on investments.¹⁵⁹ Thus for example, if a Barbadian national invests in shares in a Jamaican company, the former should not be hindered in any way in receiving the returns from his/her investment.

¹⁵⁵ Supra. Leela Ramoutar-Narinesingh, "Status of Implementation of the CARICOM Single Market and Economy: Presentation at the Caribbean Annual Private Sector Meeting 10 June 2006, Bridgetown, Barbados."

¹⁵⁶ Supra. "CARICOM: Our Caribbean Community An Introduction," Chapter 6, pg. 250.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ See Article 40 (3) of the Revised Treaty.

Under Article 40 (2) of the Revised Treaty, the removal of such restrictions is to be established by programmes initiated by the Council for Finance and Planning (COFAP) in collaboration with a Committee of Central Bank Governors.¹⁶⁰

2.2.4.1 The Regional Stock Exchange:

There are a number of measures which have been adopted to remove the restrictions on the movement of capital. One of these measures has been the establishment of a Regional Stock Exchange comprising the Barbados Securities Exchange, the Jamaica Stock Exchange and the Trinidad and Tobago Stock Exchange. In 1991 these three Stock Exchanges entered into an arrangement for cross border listing and trading of securities (stocks/shares and or bonds).¹⁶¹ This would allow the stocks, shares and bonds on the stock exchanges in each of these countries to be listed and traded in each others markets. As other CARICOM countries establish stock exchanges they too will be eligible to become members of the regional stock exchange.¹⁶²

An important feature of the Regional Stock Exchange is that anyone, be it a CARICOM national or a foreign investor, can engage in the buying or selling of securities.¹⁶³ This factor will attract foreign investment in the region and boost the investment climate for both regional and international investors. The other added advantage of a Regional Stock Market is that it offers investors with a wider market and greater choices in the selection of investment options.¹⁶⁴ A Regional Stock Exchange will also provide local business with alternatives in raising funds rather than relying solely on the various financing options available in their respective national markets.¹⁶⁵ As the Region moves towards a Single Market and Economy, businesses

¹⁶⁰ See Article 40 (2) of the Revised Treaty.

¹⁶¹ See CARICOM website at:

http://www.caricom.org/jsp/community/regional_issues/regional_stock_exchange.jsp?menu=community

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 3, pg. 68.

¹⁶⁵ Ibid.

must now adjust and take advantage of a wider market which includes not only goods, but also investments.¹⁶⁶ It will be a welcoming move if more CARICOM countries will come on board the Regional Stock Exchange and that a permanent headquarters be established.

2.2.4.2 Currency Convertibility:

Another measure which has been adopted to remove the restriction on the movement of capital is the promotion of currency convertibility. Currency convertibility refers to the ability to freely exchange the currency of one Member State into the currency of another Member State.¹⁶⁷ So for example, with currency convertibility, one would be able to change Barbados dollars in St. Lucia without any major hindrance. In July 1995 currency convertibility became a reality for CARICOM members, when Antigua, Barbados and Montserrat joined the other CARICOM countries by agreeing to import liberalisation.¹⁶⁸

The difficulty with implementing a coordinated currency convertibility system was due to the fact that countries such as Barbados, Belize, Bahamas and the OECS maintained fixed currency rates while the rest of the CARICOM countries maintained floating currencies.¹⁶⁹ Thus, the issue of currency convertibility would have been easily resolved in a situation where the value of all the currencies was fixed to a given major currency.¹⁷⁰ In any event, as the Community moves towards a single regional currency (see paragraph 1.9.2), the issue of currency convertibility would be rendered unnecessary.¹⁷¹

¹⁶⁶ Ibid.

¹⁶⁷ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 6, pg. 251.

¹⁶⁸ See: <http://sbs.com.au/theworldnews/Worldguide/index.php3?country=8&header=4>

¹⁶⁹ Supra. Duke Pollard, "The Caribbean Court of Justice: Closing the Circle of Independence," pg. 117.

¹⁷⁰ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 6, pg. 251.

¹⁷¹ Ibid.

2.2.4.3 Foreign Exchange controls:

CARICOM countries have also sought to encourage the free movement of capital by imposing, through their respective central banks, foreign exchange controls. Essentially such controls serve to ration the access to foreign currency.¹⁷² These measures, which were maintained by CARICOM countries in the 1970s and 1980s, limited foreign currency for overseas travel and the purchase of foreign luxury items.¹⁷³ The rationale behind foreign exchange controls was to curb capital outflows and to promote regional inflows. However, in order for foreign exchange controls to work and meet the objectives of the CSME, such controls must be removed from all intra-regional transactions.¹⁷⁴ Thus it would be befitting if foreign exchange controls will only be placed on capital purchases or investments made **outside** the CARICOM region.

Bearing this in mind, countries such as Barbados and Belize have been known to exercise exchange control with respect to all, including intra-CARICOM, transactions.¹⁷⁵ Despite this, during the mid 1990s the Central Bank of Barbados has gradually moved towards a programme of liberalising its exchange control regime in order to comply with its commitments under the CSME.¹⁷⁶ On the other hand, countries such as Guyana, Jamaica and Trinidad and Tobago have formally abolished foreign exchange controls thereby removing any restrictions to Capital Market activity.¹⁷⁷ The Members of the OECS also maintain that their foreign exchange system is fully liberalised.¹⁷⁸

¹⁷² Supra. "CARICOM: Our Caribbean Community An Introduction", Chapter 6, pg. 254.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Supra. James Moss Solomon, "How to do Business in the Caribbean Community"

¹⁷⁶ Dr. Marion Williams "Exchange Control Liberalisation and Capital Market Development," dated 5 May 2005. Available at:

http://centralbank.org.bb/Publications/Governor_Presentation.pdf

¹⁷⁷ "International and Regional Trade Relation: CARICOM"

http://www.delbrb.ec.europa.eu/en/irtr/caricom_overview.htm. See also:

Again, with a single regional currency coming on board in the not too distant future, the issue of foreign exchange controls would soon become superfluous as all intra-regional transactions would be made using a regional currency. As a result, foreign exchange would only be used to service extra-CARICOM transactions which would economise foreign exchange reserves.¹⁷⁹

2.2.4.4 Avoidance of Double Taxation:

In 1994, Member States concluded an Agreement for the avoidance of double taxation within the CARICOM region.¹⁸⁰ This Agreement, commonly referred to as the **Intra Regional Double Taxation Agreement**, seeks to ensure that investors do not have to pay taxes in more than one member state in respect of the yield from the same investment.¹⁸¹ This Agreement has been signed and ratified by eleven CARICOM Member States.¹⁸² Out of these countries which have signed and ratified only Antigua and Barbuda, Barbados, Belize, Guyana, Jamaica, St. Lucia, St. Vincent and the Grenadines and Trinidad and Tobago have enacted legislation to give effect to the Agreement.¹⁸³

Countries such as Haiti, Montserrat and Suriname are the only countries which have not yet signed and ratified the Agreement.¹⁸⁴

http://www.csmett.com/content2/csme/presentations/Presentation_by_H_E_Jerry_Narace_Ambassador_Extraordinary_Plenipotentiary_and_Head_CSME_Unit_to_The_Tobago_House_of_Assembly_on_The_CARICOM_Single_Market_and_Economy.shtml

¹⁷⁸ Supra. James Moss Solomon, "How to do Business in the Caribbean Community"

¹⁷⁹ Supra. Dr. Marion Williams, "Exchange Control Liberalisation and Capital Market Development,"

¹⁸⁰ Supra. "CARICOM: Our Caribbean Community An Introduction," Chapter 6, pg. 255.

¹⁸¹ Ibid. This Agreement is officially entitled "*Agreement among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Profits or Gains and Capital Gains for the Encouragement of Regional Trade and Investment.*" See:

http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_doubletaxation_1994.jsp

¹⁸² Caribbean Organisation of Tax Administrators Newsletter. Available at:

http://www.caricom.org/jsp/community/cota/cotanewsletter32_07.pdf

¹⁸³ Ibid.

¹⁸⁴ Ibid. The Bahamas has indicated that they do not wish to be a part of the CSME arrangement. As such, they also have not signed the Intra Regional Double Taxation Agreement.

2.2.5 Freedom of Movement of Services:

An important development in international trade has been the growth in recent years of trade in services.¹⁸⁵ Thus, in order for an economic space to be achieved, the free movement of services by CARICOM members across the Community must be catered for. Under the Revised Treaty, services can be provided in the following four ways:¹⁸⁶

- Through cross border trade, that is from one territory to another;
- In the territory of one Member State to the service consumer of another Member State e.g. where the service consumer is a tourist;
- Where the service supplier of one Member State establishes a commercial presence or business in another Member State;
- Where the service supplier is an individual of one Member State performing a service in the territory of another Member State e.g. a consultant.¹⁸⁷

The services market is expected to be boosted by cross border trade, movement of persons on a temporary basis and the establishment of business enterprises. As a result, E-commerce is expected to assume greater significance in general business conduct.¹⁸⁸ In this regard, Article 239 (a) of the Revised Treaty would be of some importance as it has committed Member States into entering into an undertaking to establish an elaborate E-commerce regime. One advantage of implementing an E-commerce service

¹⁸⁵ Supra. Presentation by H.E. Jerry Narace Ambassador Extraordinary and Plenipotentiary and Head CSME Unit to the Tobago House of Assembly on the CARICOM Single Market and Economy on 7 December 2005.

¹⁸⁶ See Article 36 (4) of the Revised Treaty.

¹⁸⁷ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 6, pg. 248.

¹⁸⁸ Presentation to the 21st Annual Conference of CANTO held in St Kitts on 19th-22nd June, 2005

Address by H. E Jerry Narace, Ambassador Extraordinary and Plenipotentiary and Head, CARICOM Single Market and Economy Unit at the 21st Annual Conference of CANTO.

Address available at:

http://www.csmet.com/content2/csme/presentations/Presentation_to_the_21st_Annual_Conference_of_CANTO_held_in_St_Kitts_on_19th-22nd_June_2005.shtml

oriented regime would be to communicate large amounts of data and information quickly and in a cost effective manner.¹⁸⁹

Just as in the areas of the right to establishment and freedom of movement of capital, all Member States must abolish any discriminatory restrictions on the provision of services within the Community.¹⁹⁰ The Revised Treaty also makes it mandatory on Member States to notify the Council for Trade and Economic Development (COTED) of any existing restrictions on the provision of services undertaken by nationals of other Member States.¹⁹¹ Member States are also required to freeze the introduction of any **new** restrictions on the provision of services within the Community.¹⁹²

In order to effectively promote the free movement of services under the CSME, Member States will have to ensure that nationals from other Member States have access to land, buildings, and other property on a non-discriminatory basis for the purpose which is directly related to the provision of the service.¹⁹³

Once the free movement of services under the CSME is fully on stream, it will be possible for insurance companies, banks, engineers, architects, medical personnel and other self-employed service providers of any Member State to offer services throughout the region free from any national restrictions. In this way, citizens will be able to choose among a wider range of service providers, thus encouraging competition and better rates for consumers.¹⁹⁴

2.3 THE COMPETITION COMMISSION

Under the Revised Treaty, CARICOM has developed a framework on competition within the CSME.¹⁹⁵ According to Article 169 of the Revised Treaty, the objective of

¹⁸⁹ Ibid.

¹⁹⁰ See Article 37 (1) of the Revised Treaty.

¹⁹¹ See Article 36 (3) of the Revised Treaty.

¹⁹² See Article 36 (1) of the Revised Treaty.

¹⁹³ See Article 37 (3) (e) of the Revised Treaty.

¹⁹⁴ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 6, pg. 248.

¹⁹⁵ See:

<http://www.gov.vc/Govt/Government/Executive/Ministries/FAffairsCommerce&Trade/ForeignAffairs/Foreign.asp?a=5143&z=204>

the Community Competition Policy is to ensure that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive business conduct. As a means of providing a level-playing field for all business, efforts are currently underway for all CSME Member States to establish a Community Competition Commission (CCC). The CCC, which is established under Article 171 of the Revised Treaty, will be responsible for monitoring anti-competitive practices of enterprises operating in the CSME.¹⁹⁶ The CCC, which will be responsible for administering and enforcing Competition law within the region, was recently inaugurated in Suriname on 18 January 2008.¹⁹⁷

The Revised Treaty also calls upon Member States to establish a National Competition Authority (NCA).¹⁹⁸ The purpose of this NCA is to facilitate the implementation of the rules of competition and to promote competition at a domestic level.¹⁹⁹ The NCA will be responsible for investigating allegations of anti-competitive business conduct and cooperate with the CCC and other national authorities.²⁰⁰ The Revised Treaty makes it obligatory for Member States to enact national legislative measures to ensure consistency and compliance with the rules of competition.²⁰¹ At present Barbados and Jamaica are the only two CARICOM countries which have a NCA.²⁰² Trinidad and Tobago, on the other hand, is well on its way to a full establishment of a NCA in the form of a Fair Trading Commission.²⁰³

¹⁹⁶ "Cabinet approves CSME competition commission and competition legislation." Article available at Caribseek Caribbean News dated 27 July 2007. See: <http://news.caribseek.com/set-up/exec/view.cgi?archive=139&num=53221>

¹⁹⁷ "Caribbean Single Market and Economy promotes competitiveness" Article available on CARICOM blog at: <http://www.caricomblog.com/index.php?itemid=470>

See also "Caricom Competition Commission Inaugurated" Article available on CARICOM blog at: <http://www.caricomblog.com/index.php?itemid=512>

¹⁹⁸ See Article 170(2) of the Revised Treaty.

¹⁹⁹ See Article 170(3) of the Revised Treaty.

²⁰⁰ Ibid.

²⁰¹ See Article 170(1) (b) (i) of the Revised Treaty.

²⁰² Presentation by His Excellency Jerry Narace Ambassador Extraordinary and Plenipotentiary and Head CSME Unit on 19 September 2007. Presentation available at: http://www.csmett.com/content2/csme/speeches/CSME_Sensitization_Seminars.shtml

²⁰³ Ibid.

It is a welcoming move under the Revised Treaty to have national and regional institutions monitoring anti-competitive business conduct as it will encourage businesses to be more competitive nationally, regionally and even internationally.

2.4 OVERVIEW OF THE CSME

The justification behind the CSME is to create an economic space whereby there can be free movement of factors of production, comprising capital, goods, labour, services and enterprise within the region.²⁰⁴ This free movement is critical to the development of international competitiveness of the region and will create new opportunities for investment.²⁰⁵ In order to fully facilitate the international competitiveness within the CSME, in 2003 Member States created a CARICOM Regional Organisation for Standards and Quality (CROSQ).²⁰⁶ One of the mandates of CROSQ is to promote efficiency and competitive production in trade and services, through the process of standardisation and the verification of quality.²⁰⁷ Other primary objectives of the CSME include: improved standards of living and work, full employment of labour and other factors of production, and increased production and productivity.²⁰⁸

As we have seen, all Member States are required to remove restrictive or discriminatory measures in the areas of establishment, services and capital. A study conducted by prominent economist Dr. Noel Watson and Kimberley Erriah identified over 450 legal and administrative restrictions in place across the region which need to

²⁰⁴ Delano Franklyn “We Want Justice- *Jamaica and the Caribbean Court of Justice*” at pg. 24. Excerpt was taken from Mr. Phillip Paulwell’s (former Minister of Commerce, Science and Technology) contribution to the Parliamentary debate in Jamaica regarding the replacement of the Judicial Committee of the Privy Council with the Caribbean Court of Justice. Mr. Paulwell’s contribution was made on 13 May 2003.

²⁰⁵ Ibid.

²⁰⁶ See: <http://www.crosq.org/>

²⁰⁷ See: <http://www.crosq.org/aboutcrosqcontent.htm>

²⁰⁸ Address by His Excellency Jerry Narace, Ambassador Extraordinary and Plenipotentiary Head, CSME Unit dated 22 March 2007. Address available at: http://www.csmett.com/content2/csme/speeches/labour_administration.shtml

be removed in order for the participating Member States to be CSME compliant.²⁰⁹ To date, Member States still need to undertake the necessary legislative and administrative action to remove such restrictions.

With the full free movement of the all Community's nationals taking place by 2009 and the Single Economy being phased in by 2015, the CSME may be best described today as a continued work in progress.

2.5 THE CSME AND THE EUROPEAN SINGLE MARKET

The concept behind the CSME is largely modelled after its fore-runner: the **European Single Market**. Since its inception in 1993, the European Single Market guarantees the free movement of people, goods, capital and services within the European Union (EU).²¹⁰ Just like we have seen under the CSME regime, the European Single Market makes it possible for EU citizens to live, work, study and do business throughout the EU as well as enjoy a wide choice of competitively priced goods and services.²¹¹

On 1 January 1994, the European Economic Area (EEA) was created following an Agreement between the European Free Trade Association (EFTA), the European Community (EC) and all Member States of the European Union (EU).²¹² Members of the EFTA consist of European States who either were unable to, or chose not to join the then European Economic Community (now the EU).²¹³ The EFTA countries which signed the EEA Agreement are Iceland, Liechtenstein and Norway.²¹⁴ The EEA therefore allows the EFTA countries to participate in the European Single Market

²⁰⁹ Presentation by H.E. Jerry Narace Ambassador Extraordinary and Plenipotentiary and Head CSME Unit to the Tobago House of Assembly on The CARICOM Single Market and Economy on 7 December 2005. Presentation available at:

http://www.csmeff.com/content2/csme/presentations/Presentation_by_H_E_Jerry_Narace_Ambassador_Extraordinary_Plenipotentiary_and_Head_CSME_Unit_to_The_Tobago_House_of_Assembly_on_The_CARICOM_Single_Market_and_Economy.shtml

²¹⁰ See: The EU Single market website at: http://ec.europa.eu/internal_market/index_en.htm

²¹¹ Ibid.

²¹² See: http://en.wikipedia.org/wiki/European_Economic_Area

²¹³ See: http://en.wikipedia.org/wiki/European_Free_Trade_Association

²¹⁴ See: http://en.wikipedia.org/wiki/European_Economic_Area

without formally joining the EU.²¹⁵ So at present, the EFTA countries that are part of the EEA enjoy free trade with the EU.

As mentioned in paragraph 1.9.2, the EU has moved towards a Monetary Union by establishing a single common currency in the form of the EURO. Currently, the EURO is the official currency of 15 EU States.²¹⁶ Again, such a movement poses to be a similar objective under the CSME in which a common CARICOM currency is expected to come into play by the year 2015.²¹⁷

It is noteworthy to mention that in every aspect, the EU and its Single Market is larger than CARICOM and its CSME. Firstly, the EU comprises of 27 Member States which accounts for an additional 12 more States than CARICOM. Secondly, the area space of the European Single Market is almost 10 times larger than the CSME.²¹⁸ Thirdly, in terms of population size, CARICOM's meagre 15 million nationals is nothing of substance when compared to the EU's 495 million people.²¹⁹ Thus as the CSME is operating at a much smaller scale than the European Single Market, there is a need for the former to become more dynamic and able to adapt quickly and respond effectively to global trade. That is the only way that the CSME will be a force to reckon with in the international trade arena.

It is therefore clear that the CSME and the European Single Market share a similar vision of economic and regional integration. However due to the minor differences and intricacies of both entities, the manner in which they go about to achieve this vision may slightly differ.

²¹⁵ Ibid.

²¹⁶ See: <http://en.wikipedia.org/wiki/Euro>.

²¹⁷ See Paragraph 2.1 of this dissertation.

²¹⁸ The area space of the EU is 4,324,782 km². This does not include the three members of the European Free Trade Association (EFTA). See: http://en.wikipedia.org/wiki/European_Union

²¹⁹ The EU's estimated population in 2007 was 495,128,529. See: http://en.wikipedia.org/wiki/European_Union

2.6 PREFERENTIAL TRADE ARRANGEMENTS OUTSIDE THE CSME

CARICOM has put in place a number of preferential trade arrangements with countries and entities which exist outside the CSME. Some of these most noted arrangements are as follows:

2.6.1 CARICOM-Dominican Republic Free Trade Agreement:

The CARICOM-Dominican Republic Free Trade Agreement (FTA) is the first of such Agreement negotiated by the Community.²²⁰ This Agreement was signed by CARICOM and the Dominican Republic on 22 August 1998 and it entered into force on 1 December 2001.²²¹ Under this FTA, the parties agreed to create a free trade area that included the trade in goods, services, investment and economic co-operation.²²²

This FTA, while allowing CARICOM LDCs to enjoy preferential access into the Dominican Republic market, does not require any reciprocal preferential access to goods/services coming from the Dominican Republic.²²³ This will therefore be an added advantage to the smaller economies in CARICOM which now have preferential trade access to a market of more than nine million persons.²²⁴

2.6.2 CARICOM-Cuba Diplomatic Relations and Free Trade Agreement:

In order to promote trade and relations between both parties, on 5 July 2000 a CARICOM-Cuba Trade and Economic Cooperation Agreement was signed.²²⁵ This Agreement is not yet fully in force and is being applied provisionally on a bilateral

²²⁰ Supra. "CARICOM: Our Caribbean Community An Introduction", Chapter 8, pg. 301.

²²¹ Ministry of Foreign Affairs and Foreign Trade, Jamaica website: <http://www.mfagt.gov.jm/?q=trade-agreements-to-which-jamaica-is-a-party>

²²² Ibid.

²²³ Press Release dated 30 November 2001: "CARICOM/Dominican Free Trade Agreement comes into force." See: http://www.caricom.org/jsp/pressreleases/pres145_01.htm

²²⁴ The estimated population of the Dominican Republic in 2007 was 9.365 million persons. See: <http://www.state.gov/r/pa/ei/bgn/35639.htm>

²²⁵ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 8, pg. 300.

basis between CUBA and six CARICOM signatory countries namely-Belize, Guyana, Jamaica, St. Kitts and Nevis, St. Vincent and the Grenadines and Trinidad and Tobago.²²⁶

The text of this Agreement contains six Annexes. The first two Annexes contain a list of exports which will be granted duty free access into both markets. The third and fourth Annexes list the items which would be granted a phased reduction of duty to zero over a period of four years.²²⁷ In keeping with the Community's policy to assist and protect the economies of the LDCs, these Member States are not required to grant any preferential access into their markets for goods which originate from Cuba.²²⁸

In December 2005, a Declaration of Bridgetown was signed at the close of the one-day CARICOM-Cuba summit in Barbados. The purpose of this Declaration, *inter alia*, was to give Cuba access to free trade within the region.²²⁹

Over the years CARICOM has also received significant assistance from Cuba in the fields of health and human resources. It has been recorded that more than 600 Cuban cooperators are currently offering their services in 14 CARICOM countries, 66% of them in the area of public health.²³⁰ In 1989 a CARICOM-Cuba Scholarship programme was established to increase cooperation and educate CARICOM professionals in critical areas such as education, health and agriculture.²³¹

Recently on 8 December 2007, CARICOM observed the 35th anniversary of the establishment of diplomatic relations between the first four independent CARICOM countries (namely: Barbados, Jamaica, Guyana and Trinidad and Tobago) and the

²²⁶ Supra. Ministry of Foreign Affairs and Foreign Trade, Jamaica website:

<http://www.mfaft.gov.jm/?q=trade-agreements-to-which-jamaica-is-a-party>

²²⁷ Caribbean Regional Negotiating Machinery website: http://www.crnrm.org/caricom_cuba.htm

²²⁸ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 8, pg. 300.

²²⁹ The Declaration of Bridgetown which was adopted in Bridgetown Barbados was signed 14 CARICOM member States. The Declaration of Bridgetown is available on CARICOM website at: http://www.caricom.org/jsp/pressreleases/pres215_05.jsp

²³⁰ "Cuba and Caribbean Countries Mark Anniversary of Relations." Article is posted on CARICOM's blog and is available at: <http://www.caricomblog.com/index.php?itemid=467>

²³¹ Supra. "CARICOM: Our Caribbean Community An Introduction" Chapter 8, pg. 299.

Government of Cuba in 1972.²³² Due to this, CARICOM-Cuba day is now celebrated on 8 December each year.

2.6.3 CARICOM-COSTA RICA Free Trade Agreement:

On 9 March 2004, CARICOM and Costa Rica signed a FTA in Jamaica. Under this FTA, the Caribbean Community would have access to a national market of some four million inhabitants. This FTA is of vital importance to CARICOM as it serves as a gateway to Central America, which is a region that has not been adequately explored by Caribbean producers.²³³ As with the other bilateral agreements we have seen, CARICOM MDCs will provide duty free access to most products from Costa Rica. CARICOM LDCs namely OECS and Belize, while enjoying duty free access to Costa Rica are not required to grant similar access to Costa Rican products.²³⁴ It is estimated that over 90% of CARICOM products are granted duty-free entry into Costa Rica.²³⁵

The Costa Rican legislature approved the FTA agreement on 9 August 2005. Costa Rica and Trinidad and Tobago exchanged ratification instruments and the agreement entered into force for these two countries on 15 November 2005. The agreement entered into force between Costa Rica and Guyana on 30 April 2006 and between Costa Rica and Barbados on 1 August 2006. Following the first free trade agreement with the Dominican Republic in 1998, the CARICOM-Costa Rica FTA marks another step by CARICOM in widening trade and economic relations with countries in the wider Caribbean.²³⁶

²³² “35 years of fruitful friendship” published in Barbados Nation’s newspaper on 12 December 2007.

Article available at: <http://www.nationnews.com/story/323507970100084.php>

²³³ CARICOM Press Release dated 10 March 2004. Available at:

http://www.crn.org/documents/press_releases_2004/CARICOM%20and%20Costa%20Rica%20sign%20FTA.pdf

²³⁴ Ibid.

²³⁵ “Cheaper beef from Costa Rica,” Trinidad and Tobago Guardian Newspaper dated 1 August 2007.

Article available at: <http://www.guardian.co.tt/archives/2007-08-01/business3.html>

²³⁶ Supra. CARICOM Press Release dated 10 March 2004.

2.6.4 CARICOM-CANADA Free Trade Agreement:

In 1986, the government of Canada established a Caribbean-Canada Trade Agreement which became known as CARIBCAN.²³⁷ The purpose of CARIBCAN was to promote trade, investment and to provide duty-free access to the Canadian market for most Commonwealth Caribbean exports.²³⁸ Within the CARIBCAN agreement, approximately 96 per cent of imports from the Commonwealth Caribbean enter Canada duty-free.²³⁹ Items exempted under the arrangement include some textiles, clothing and footwear, as well as certain agricultural products including products subject to tariff rate quotas.²⁴⁰ With the exception of Suriname and Haiti, all the CARICOM member countries benefit from the CARIBCAN Free Trade Arrangement.²⁴¹

It should however be noted that the CARIBCAN arrangement was seen to be limited as it only covered trade in goods and did not extend to trade of services.²⁴² In addition to this, the CARIBCAN arrangement also required periodic waivers from the WTO.²⁴³ With the expiry of the CARIBCAN arrangement in December 2006 it was imperative for CARICOM members to negotiate a new arrangement with Canada.²⁴⁴ As a result, on 18 October 2007, both parties commenced negotiations in Jamaica with a view to establish a new Canada-CARICOM FTA.²⁴⁵ It is expected that a new arrangement will be attained at the upcoming Canada-CARICOM Leaders Summit which is scheduled to take place early in 2008.

²³⁷ See: <http://en.wikipedia.org/wiki/CARIBCAN>

²³⁸ Ibid. See also <http://www.crn.org/documents/CARIBCAN/CARIBCAN%20Intro.pdf>

²³⁹ "Background to Negotiations on CARICOM Canada Trading Arrangements" available at: http://www.crn.org/psbackground_caricom-canada.htm

²⁴⁰ Ibid.

²⁴¹ See: <http://en.wikipedia.org/wiki/CARIBCAN>

²⁴² Supra. "Background to Negotiations on CARICOM Canada Trading Arrangements"

²⁴³ "CARICOM Canada talks to start by year end," Trinidad and Tobago Guardian Newspaper dated 24 July 2007. Article can be found at: <http://www.guardian.co.tt/archives/2007-07-24/business4.html>

²⁴⁴ Supra. Ministry of Foreign Affairs and Foreign Trade, Jamaica website:

<http://www.mfaft.gov.jm/?q=trade-agreements-to-which-jamaica-is-a-party>

²⁴⁵ "Canada-Caribbean Community Free Trade Negotiations" See: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/caricom.aspx>

2.6.5 Proposed Free Trade arrangement between CARICOM and MERCOSUR:

It is also informative to note that CARICOM is presently exploring possible trade arrangements with MERCOSUR. MERCOSUR, also known as the Southern Common Market, is South America's leading trading bloc.²⁴⁶ MERCOSUR was set up in March 1991 by Argentina, Brazil, Paraguay and Uruguay under the Treaty of Asuncion. In 1994, the Treaty of Ouro Preto, amended the Treaty of Asuncion thereby giving the body a wider international status and a formalised customs union.²⁴⁷ On 4 July 2006 it was agreed that Venezuela would become the fifth full member of MERCOSUR.²⁴⁸ Venezuela's entry as a full member is however still mired with difficulties as it is still awaiting ratification by the Brazilian and Paraguayan Parliaments.²⁴⁹ Countries such as Bolivia, Chile, Columbia, Ecuador and Peru are Associate Members of MERCOSUR. These Associate Members can join in free trade agreements but remain outside the bloc's customs union.²⁵⁰

Within MERCOSUR, Brazil and Argentina are the two economic giants. Venezuela, a major oil and gas producer, could give MERCOSUR greater economic clout once they officially become a full member. On the flip side of the coin, Venezuela's energy assets are a contribution that is more theoretical than practical, because the infrastructure to make them available to other MERCOSUR countries does not exist.²⁵¹

²⁴⁶ "Profile: Mercosur- Common Market of the South." BBC article

See: <http://news.bbc.co.uk/1/hi/world/americas/5195834.stm>

²⁴⁷ Ibid.

²⁴⁸ Ibid.

²⁴⁹ Mario Osava, "Challenges 2007-2008: Mercosur Limpes Slowly Along." This article is available at: <http://www.webcitation.org/5Ubfvj2vn>

²⁵⁰ Supra. "Profile: Mercosur- Common Market of the South."

²⁵¹ Supra. Mario Osava, "Challenges 2007-2008: Mercosur Limpes Slowly Along." View was expressed by Ms. Elsa Cardoso, Professor of International Relations at the Central and Metropolitan Universities in Caracas.

Since around 2003, approaches have been made by MERCOSUR to CARICOM to negotiate a Free Trade arrangement between the two regions.²⁵² In this regard, CARICOM and MERCOSUR have held a number of joint meetings to solidify such an arrangement.²⁵³ It is anticipated that a CARICOM/MERCOSUR FTA will go beyond a mere trade in goods, but also include cooperation in services, investment, tourism development, technical cooperation and capacity building.²⁵⁴

In August 2007, the President of Brazil His Excellency Mr. Luis Da Silva paid a working visit to the then Prime Minister the Hon. Portia Simpson of Jamaica. The purpose of this visit was to deepen trade relations between the two countries. One of the items on the agenda for discussion was the proposed CARICOM-MERCOSUR-Free Trade Area arrangements.²⁵⁵ Despite these many exploratory overtures, to date CARICOM has no Free Trade Agreement with MERCOSUR or any MERCOSUR country.²⁵⁶

Based on the size of the MERCOSUR market, its geographic proximity and the fact that Suriname and Guyana are located on the South American continent, securing a Free Trade Agreement would be of great significance to CARICOM countries.

2.6.6 CARICOM-PetroCaribe Energy Initiative:

PetroCaribe is a Regional Energy Cooperation Agreement proposed by the Government of Venezuela to purchase oil on conditions of preferential payment. PetroCaribe was launched in June 2005.²⁵⁷ Essentially, the PetroCaribe initiative aims

²⁵² Ministry of Foreign Affairs and Foreign Trade, Jamaica website: <http://www.mfaft.gov.jm/?q=trade-agreements-to-which-jamaica-is-a-party>

²⁵³ Ministry of Foreign Trade and International Cooperation (MOFTIC) Digest 2006, Issue No. 1 (Guyana) Available at: <http://www.moftic.gov.gy/Publications/digest0106.pdf>.

²⁵⁴ Ibid.

²⁵⁵ "President of Brazil to Visit on Wednesday" Article dated 7 August 2007 and is available at: http://www.jis.gov.jm/foreign_affairs/html/20070807T140000-0500_12683_JIS_PRESIDENT_OF_BRAZIL_TO_VISIT_ON_WEDNESDAY.asp

²⁵⁶ "CARICOM-MERCOSUR Private Sector Trade Note (Final) dated 5 December 2006. http://www.crn.org/documents/private_sector/CARICOM-Mercosur_trade_note.pdf

²⁵⁷ See: <http://en.wikipedia.org/wiki/Petrocaribe>

to reduce the prices Caribbean nations pay for oil imports.²⁵⁸ This payment system allows for a few nations to buy oil on market value by paying a certain amount upfront. The remainder of the price of oil can be paid through a 25 year financing agreement at a rate of one per cent interest.²⁵⁹ So for example, where the per barrel price exceeds US\$40, the payment period is extended to 25 years, including a grace period of two years together with an interest rate of one per cent.²⁶⁰ In addition the PetroCaribe arrangement allows for nations to pay part of the cost with other products provided to Venezuela, such as bananas, rice, and sugar.²⁶¹ Thus, the Initiative provides the option for member nations to pay for low-cost oil with goods and services instead of cash.²⁶²

At present, there are 12 CARICOM countries which are members of the PetroCaribe initiative namely: Antigua and Barbuda, Bahamas, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Suriname.²⁶³ Non-CARICOM PetroCaribe Members are Cuba, Dominican Republic, Honduras, Nicaragua and Venezuela.²⁶⁴ Trinidad and Tobago, Barbados and Montserrat are the only three CARICOM countries that have not signed the PetroCaribe Initiative. Venezuela President Hugo Chavez has expressed a desire to have Trinidad and Tobago to become fully involved in PetroCaribe.²⁶⁵ In expressing such a desire, Mr. Chavez has openly acknowledged the role of Trinidad and Tobago as a lead oil producer within CARICOM.²⁶⁶ It was therefore not surprising that President Chavez invited officials from Trinidad and Tobago to attend as observers to the 4th

²⁵⁸ "Chavez in Caribbean Oil Meeting" BBC article available at: <http://news.bbc.co.uk/1/hi/business/4219190.stm>

²⁵⁹ Supra.: <http://en.wikipedia.org/wiki/Petrocaribe>

²⁶⁰ "PM urges CARICOM to embrace PetroCaribe Agreement" Article available at: http://www.jis.gov.jm/special_sections/CARICOMNew/PMUrges.html

²⁶¹ Supra.: <http://en.wikipedia.org/wiki/Petrocaribe>

²⁶² "Venezuela attends 4th Annual PetroCaribe Summit in Cuba" dated 23 December 2007. Article available at: <http://www.venezuelanalysis.com/node/3026>

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ "Chavez to T&T: Join PetroCaribe" Article is available in Trinidad and Tobago Guardian newspaper dated 27 December 2007.

²⁶⁶ Ibid.

Summit of PetroCaribe which was concluded on 21 December 2007 in Havana, Cuba²⁶⁷

To ensure energy security and stability in the Caribbean, ten countries attending the Third Summit in August 2007, signed the **PetroCaribe Energy Security Treaty**. Out of these 10 countries, seven are members of CARICOM namely: Grenada, Belize, Dominica, Haiti, St. Vincent and the Grenadines, Jamaica and Suriname.²⁶⁸ This Treaty is intended to, *inter alia*, expand refining capacity and build or improve energy infrastructure in the region.²⁶⁹ Again, it is noted that Trinidad and Tobago, a key player in oil and gas in the region, is not a member of this particular Treaty. The views of Antigua and Barbuda's Prime Minister, is apt i.e. that it is "imperative that the PetroCaribe Member States acknowledge that Trinidad and Tobago has a major role to play in the broader context of regional energy security."²⁷⁰

As recent as January 2008, the Trinidad and Tobago government gave its clearest indication that it would not change its position and be part of the PetroCaribe Initiative. Prime Minister of Trinidad and Tobago, the Hon. Mr. Patrick Manning indicated that his administration would not sign on to the initiative as his country remains committed to the Free Trade Area of the Americas (FTAA).²⁷¹ As Trinidad and Tobago is earmarked to be the headquarters of the FTAA, there is a fear that entering into the PetroCaribe Initiative will compromise and go against the stated objectives of the FTAA.²⁷²

²⁶⁷ "Chavez says there's role for Trinidad in PetroCaribe" Article available on CARICOM blog at: <http://www.caricomblog.com/index.php?itemid=485>

²⁶⁸ See: http://translate.google.com/translate?hl=en&sl=es&u=http://www.pdvsa.com/index.php%3Ftpl%3Dinterface.sp/design/readmenuprinc.tpl.html%26newsid_obj_id%3D174%26newsid_temas%3D48&prev=/search%3Fq%3DPDVSA%2BPetroCaribe%26hl%3Den%26lr%3D%26sa%3DGr

²⁶⁹ Ibid.

²⁷⁰ This Statement was attributed to Prime Minister Baldwin at the Fourth PetroCaribe Summit in Cuba. Supra. "Chavez to T&T: Join PetroCaribe" Article in Trinidad and Tobago Guardian newspaper dated 27 December 2007.

²⁷¹ "Trinidad will not sign on PetroCaribe" Article available in Jamaica Gleaner dated 4 January 2008 at: <http://www.jamaicagleaner.com/gleaner/20080104/lead/lead7.html>

²⁷² Ibid.

CHAPTER 3

The Caribbean Court of Justice

3.1 INTRODUCTION TO THE CARIBBEAN COURT OF JUSTICE

The Caribbean Court of Justice (CCJ) is the regional judicial tribunal established on 14 February 2001 by the Agreement Establishing the Caribbean Court of Justice.²⁷³ The Agreement was originally signed by 10 CARICOM States namely: Antigua and Barbuda; Barbados; Belize; Grenada; Guyana; Jamaica; St. Kitts and Nevis; St. Lucia; Suriname and Trinidad and Tobago.²⁷⁴ Two further states, Dominica and St. Vincent and The Grenadines, signed the agreement on 15 February 2003, bringing the total number of signatories to 12. The only CARICOM countries that have not signed the Agreement thus far are The Bahamas, Haiti and Montserrat. The CCJ was finally inaugurated on 16 April 2005 in Port of Spain, Trinidad & Tobago.²⁷⁵

Before its inauguration in the April 2005, the establishment of a regional Court was the subject of much debate. As far back as the year 1901, an editorial article in the *Jamaican Daily Gleaner* newspaper expressed the view that the final appellate Court in the form of the UK Privy Council, was ‘out of joint’ with the realities of time.²⁷⁶ Forty-six years later, in 1947, a meeting of West Indian governors deliberated on the appropriateness of a West Indian Court of Appeal.²⁷⁷ However, the first formal representation of a regional appellate body was made in 1970 when a Jamaican delegation at the Sixth Heads of Government Conference, which convened in Jamaica,

²⁷³ The Agreement Establishing the Caribbean Court of Justice is available at: http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_ccj.pdf

²⁷⁴ This information was sourced from the website for the Caribbean Court of Justice which can be found at <http://www.caribbeancourtjustice.org/about.htm>

²⁷⁵ Ibid.

²⁷⁶ Supra. Delano Franklyn, “We Want Justice- *Jamaica and the Caribbean Court of Justice*” pg. 22.

²⁷⁷ Ibid.

proposed the establishment of a Caribbean Court of Appeal in substitution for the Judicial Committee of the Privy Council (Privy Council).²⁷⁸

Prior to the establishment of the CCJ, the CARICOM countries which were former British colonies retained the Privy Council as their highest Court of Appeal. There was one exception in Guyana which abolished appeals to the Privy Council in year 1966.²⁷⁹ Quite naturally therefore, the CCJ was originally conceptualized as a Court of last resort replacing the London-based Privy Council. Countries such as Haiti and Suriname which subscribe to the civil law system do not have the Privy Council as their final Court of Appeal.

As a consequence, the original concept of the CCJ was limited to the usual civil and criminal jurisdiction.²⁸⁰ As developments transpired, the CCJ as now established has the original jurisdiction of final determination in respect of issues arising out of the Revised Treaty and the Caribbean Single Market and Economy.²⁸¹ The CCJ's original jurisdiction is specifically enshrined under Chapter Nine of the Revised Treaty which deals with Disputes Settlement.²⁸² It is important to bear in mind that when exercising its original jurisdiction the CCJ will be applying international law which is common to both civil and common law jurisdictions.²⁸³ As a result, civil law jurisdictions like Suriname and Haiti will have no problems in submitting to the jurisdiction of the CCJ in the exercise of its original jurisdiction.²⁸⁴ The 12 CARICOM countries which have signed the Revised Treaty and the Agreement establishing the CCJ have already accepted the original jurisdiction of the Court (see above and paragraph 2.1).

²⁷⁸ See: <http://www.caribbeancourtjustice.org/about.htm>

²⁷⁹ Supra. Delano Franklyn, "We Want Justice- *Jamaica and the Caribbean Court of Justice*". See Table at Appendix IV.

²⁸⁰ Keith S. Sobion Esq. "The Role of Legal Education in Preparing for a Final Court of Appeal" at pg. 2. This article is available from The Norman Manley Law School, Mona, Kingston, Jamaica.

²⁸¹ Ibid.

²⁸² See Article 211 of the Revised Treaty.

²⁸³ Duke E. Pollard, "The Caribbean Court of Justice in Regional Economic Development." This Article is available in the Caribbean Court of Justice- Issues and Perspectives (2001) Volume 1 at pg. 12. See pg. 23.

²⁸⁴ Ibid.

For the Member States which have retained the Privy Council as their final appellate court, the introduction of the appellate jurisdiction of the CCJ is purely a matter of constitutional law. These Member States are required to amend their Constitutions and enact the relevant legislation to reflect the CCJ as their final appellate Court. In this respect, Barbados passed the Caribbean Court of Justice Act of 2003 and the Constitution Amendment Act of 2003.²⁸⁵ Both of these Acts were brought into force by Proclamation on 8 April 2005.²⁸⁶

In November 2004, Guyana's National Assembly unanimously approved the passage of four Bills which had the effect, *inter alia*, of making the CCJ their final Court of Appeal.²⁸⁷ These four Bills were: the Caribbean Court of Justice Bill No. 15 of 2004; the Protocol to the Agreement Establishing the Court of Justice Bill No. 16 of 2004; the Protocol on the Privileges and Immunities of the Caribbean Court of Justice and the Regional Judicial and Legal Services Commission Bill No. 17 of 2004; and the Caribbean Court of Justice Trust Fund Agreement Bill No. 18 of 2004.²⁸⁸ As a result of these pieces of legislation, to date the CCJ is the final appellate Court for only Barbados and Guyana.²⁸⁹

It is worth mentioning at this point that the Government of Jamaica also enacted three Acts which had the effect of abolishing the right of appeal to the Privy Council and to substitute a new right of appeal in the CCJ. However because the Acts were passed only by an ordinary majority vote, the Privy Council ruled that they were void

²⁸⁵ Céline Abramschmitt, "Is Barbados Ready for Same-Sex marriage?: Analysis of Legal and Social Constructs" at pg. 4. This article is available at:

<http://sta.uwi.edu/conferences/salises/documents/Abramschmitt%20C.pdf>

²⁸⁶ Ibid. pg. 5.

²⁸⁷ "Parliament unanimously approves CCJ legislation" Article available in Guyana Chronicle dated 5 November 2004. See: <http://www.guyanachronicle.com/ARCHIVES/archive%2005-11-04.html>

²⁸⁸ Ibid.

²⁸⁹ The Hon. Mr. Justice Hayton (Present Judge of the CCJ), "The Role of the Caribbean Court of Justice: An Overview" at pg. 3. This article is available at: <http://www.caribbeancourtsofjustice.org/speeches/hayton/The%20Role%20of%20the%20C%20C%20J%20%20Mark%20II.pdf>

as they were not passed in accordance with the procedure required by the Jamaican Constitution.²⁹⁰

There is therefore a challenge faced the former British colonies of the Caribbean Community to obtain the constitutional majorities to make the CCJ their final Court of Appeal.

3.2 THE CCJ AS AN INTERNATIONAL TRIBUNAL

One of the most interesting dimensions of the CCJ is that the structure of the Court is unique.²⁹¹ It is unique simply because the Court exercises a dual function: an appellate jurisdiction and an original jurisdiction.²⁹² In its appellate jurisdiction, the CCJ is a final court of appeal in respect of all civil, criminal and constitutional matters for all CARICOM countries which cater for this in their domestic law.²⁹³ In its original jurisdiction, the CCJ is an **international tribunal** employing rules of international law in interpreting and applying the Revised Treaty.²⁹⁴ Due to the scope of this paper, special emphasis will be paid on the original jurisdiction of the CCJ.

According to the President of the CCJ the Hon. Mr. Justice Michael de la Bastide, in its original jurisdiction, the court performs three functions:

²⁹⁰ *Independent Jamaica Council for Human Rights (1998) Ltd. and Others vs. Hon. Syringa Marshall-Burnett and the AG of Jamaica*. Privy Council Appeal No. 41 of 2004.

²⁹¹ Supra. Edwin Carrington, "The challenges of Globalisation: The CARICOM Response – The CSME, The Caribbean Court of Justice and the Role of Public Servants within the Process" by. This Article is available in the Caribbean Court of Justice- Issues and Perspectives (2001) Volume 1 at pg. 1. See pg. 5.

²⁹² Rt. Hon. Mr. Justice de la Bastide, President of the Caribbean Court of Justice, "The Caribbean Court of Justice as a Regional Court," paper presented at Managua, Nicaragua, October 2007. See pg. 4. This article is available at:

http://www.ccj.org.ni/press/conferencias/01_CARICOM%20%20MR.%20JUSTICE%20MICHAEL%20de%20la%20BASTIDE_TC.pdf

²⁹³ Ibid.

²⁹⁴ Supra. Duke E. Pollard, "The Caribbean Court of Justice in Regional Economic Development". This Article can be found in the Caribbean Court of Justice- Issues and Perspectives (2001) Volume 1 at pg. 12. See pg. 19.

- 1) The Court has responsibility for determining how the provisions of the Revised Treaty are to be interpreted and applied. **It is therefore the interpreter of the rules of the CSME;** [My emphasis].
- 2) The Court alone provides the means by which the rights and freedoms conferred and the corresponding obligations imposed by the Revised Treaty will be vindicated and enforced;
- 3) The Court alone provides a compulsory method of resolving with finality disputes between participants in the CSME.²⁹⁵

In addition to this, under Article 212 the CCJ also has exclusive jurisdiction to deliver advisory opinions concerning the interpretation and application of the Revised Treaty. Such advisory opinions shall be delivered only at the request of the Member States which are parties to a dispute or the Community itself.

Other integration movements like the European Union, the Andean Common Market, the East African Community and the Central American Common Market, all have Courts to interpret and apply the relevant Treaties establishing these groupings.²⁹⁶ However, those Courts are all international tribunals and do not combine in their jurisdictions a competence to deal with domestic or municipal law issues of a civil and criminal law nature like the CCJ.²⁹⁷ Interestingly enough, the East African Community (EAC) is currently preparing to follow the CARICOM model.²⁹⁸ In that case, the

²⁹⁵ Supra. Rt. Hon. Mr. Justice de la Bastide, President of the Caribbean Court of Justice, “The Caribbean Court of Justice as a Regional Court,”

²⁹⁶ Supra. Edwin Carrington, “The challenges of Globalisation: The CARICOM Response – The CSME, The Caribbean Court of Justice and the Role of Public Servants within the Process” This Article can be found in the Caribbean Court of Justice- Issues and Perspectives (2001) Volume 1 at pg. 1. See pg. 5.

²⁹⁷ Ibid.

²⁹⁸ Ibid.

jurisdiction of the East African Court of Justice (EACJ) may be extended to appellate and human rights at a suitable date to be determined by its Council of Ministers.²⁹⁹

3.3 THE CCJ AND THE EUROPEAN COURT OF JUSTICE

Given the unique status of the CCJ, it would be beneficial at this point to make some sort of comparison between it and another international judicial tribunal - namely the European Court of Justice.

As already seen, the CCJ is an international integration judicial institution which is required to employ rules of international law in reaching its determinations.³⁰⁰ The application of rules of international law by the CCJ is specifically referred to in Article 217(1) of the Revised Treaty.³⁰¹ In fact, when acting as an international tribunal and exercising its original jurisdiction, the CCJ will apply rules and principles of public international law, law of treaties, international trade and economic law, international investment law and human rights law.³⁰² Without prejudice to the right of applying international law principles, the CCJ may also resort to general or equitable principles, (ex aequo et bono) if the parties so agree, when deciding a dispute under its original jurisdiction.³⁰³

Having said this, the jurisdiction of the CCJ is conspicuously different from that of the European Court of Justice (ECJ). The ECJ is empowered to apply Community Law which is neither international law nor municipal law.³⁰⁴ Rather Community law is a body of norms peculiar to the European Union by virtue of its status as a supranational organisation.³⁰⁵ When one speaks of “supranational”, one speaks of the voluntary

²⁹⁹ See the EAC website at <http://www.eac.int/court.htm>

³⁰⁰ Supra. Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” at pg. 42.

³⁰¹ Article 217 (1) reads: “The Court, in exercising its original jurisdiction under Article 211, shall apply such rules of international law as may be applicable.”

³⁰² See the Foreword to the Caribbean Court of Justice- Issues and Perspectives (2001) Volume 1.

³⁰³ See Article 217(3) of the Revised Treaty. See also Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” at pgs. 42-43.

³⁰⁴ Supra. Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” at pg. 43.

³⁰⁵ Ibid.

derogations from sovereignty and the competence to make laws with direct effect on all persons within a territorial State without confirmation or promulgation by that State.³⁰⁶ Thus, in the normal course of events, this requires a State to voluntarily surrender attributes of sovereignty or statehood to the supranational entity.³⁰⁷ As a result of being a supranational entity, the EU is able to enact legislation (e.g. in the form of Regulations, Directives and Decisions) which can directly affect all member states and their natural and juridical persons. In such a circumstance, when EU legislation conflicts with national law, the principle of **Supremacy** applies and the EU law is considered to take precedence.³⁰⁸ In addition to being a supranational entity, the EU also has its own legal capacity and can enter into various Treaties in its own right. An example of such Treaties are the 1976 Barcelona Convention for Protection against Pollution in the Mediterranean Sea and the 1997 Kyoto Protocol on Climate Change.

CARICOM on the other hand is not a supranational entity like the EU but rather an association of sovereign States.³⁰⁹ CARICOM itself is not empowered to enact laws on behalf of its Member States. Such a power is solely vested in the Parliament of each CARICOM country. Therefore, unlike the ECJ, the CCJ does not apply Community law. Instead the CCJ applies international law which is duly recognised by sovereign States.

3.4 THE CCJ, THE CSME AND THE PROMOTION OF LEGAL CERTAINTY

It has already been established that the CCJ is the judicial institution with compulsory and exclusive jurisdiction to hear and determine disputes concerning the Revised Treaty establishing CARICOM and the CSME.³¹⁰ In the exercise of its original jurisdiction, the CCJ is therefore perceived as the “institutional centrepiece of

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ See: http://en.wikipedia.org/wiki/European_Union#_note-art249

³⁰⁹ Supra. Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” at pgs. 44-45.

³¹⁰ Ibid. pgs. 131-132

the CSME.”³¹¹ The following are critical areas on which the CCJ will have to adjudicate upon:

- Rules of Origin
- Discriminatory import duties
- Application of export drawback schemes
- Quantitative restrictions
- Rules of competition
- Dumping and subsidies
- Rights of establishment and
- Free movement of services.³¹²

Based on the foregoing, one can appreciate that the CCJ has a vital role to play in ensuring the efficient and smooth operation of the CSME.³¹³ Hence the relationship between the two is symbiotic and it is clear that neither the CCJ nor the CSME can exist without the other.³¹⁴

On reflection, it is perhaps quite appropriate for the CCJ to be vested with the original jurisdiction in interpreting the provisions of the Revised Treaty. If the individual municipal Courts of all Member States had the jurisdiction to interpret and apply the Revised Treaty, this would lead to a situation of legal uncertainty caused by a series of judicial pronouncements which would not be consonant with one another.³¹⁵ Thus by investing the CCJ with this original jurisdiction, will promote legal certainty

³¹¹ Ibid. pg. 132

³¹² Supra. Delano Franklyn, “We Want Justice- *Jamaica and the Caribbean Court of Justice*” at pgs. 24-25.

³¹³ Supra. Duke E. Pollard, “The Caribbean Court of Justice in Regional Economic Development”. This Article can be found in the Caribbean Court of Justice- Issues and Perspectives (2001) Volume 1 at pg. 12. See pg. 23.

³¹⁴ Supra. Delano Franklyn, “We Want Justice- *Jamaica and the Caribbean Court of Justice*” at pgs. 24-25.

³¹⁵ Supra. Duke E. Pollard, “The Caribbean Court of Justice in Regional Economic Development.” This Article can be found in the Caribbean Court of Justice- Issues and Perspectives (2001) Volume 1 at pg. 12. See pg. 22.

within the Community.³¹⁶ This in turn will enhance the stability of expectations of the investment climate and promote investor confidence across the Region.³¹⁷ This legal certainty will not only promote local investment but also foreign investment as foreign investors normally provide for dispute settlement procedures in their relevant investment instruments.³¹⁸

In the final analysis, one can conclude that the CCJ plays a critical role in ensuring legal certainty in the Community and the CSME. In this respect, the CCJ is seen as a regional commercial Court, which adjudicates on trade and CSME matters that cannot be resolved at diplomatic and political levels.³¹⁹ As a result, the establishment of the CCJ would provide a vehicle for the expeditious and satisfactory resolution of a wide range of commercial disputes.³²⁰

3.5 THE CCJ AND THE DOCTRINE OF STARE DECISIS

The doctrine of *stare decisis*, or judicial precedent, requires a Court to pronounce in the same manner provided that the circumstances of the case are similar.³²¹ This doctrine of *stare decisis*, which is peculiar to common law jurisdictions, is imported into the Agreement establishing the CCJ.³²² Article III (2) of the said Agreement specifically provides that ‘the decisions of the Court shall be final.’ Although this finality in decision making, apply to both the exercise of the CCJ’s appellate and original jurisdiction, the focus on this paper will be placed on the latter.

³¹⁶ Supra. Edwin Carrington, “The challenges of Globalisation: The CARICOM Response – The CSME, The Caribbean Court of Justice and the Role of Public Servants within the Process.” This Article can be found in the Caribbean Court of Justice- Issues and Perspectives (2001) Volume 1 at pg. 1. See page 9.

³¹⁷ Ibid.

³¹⁸ Supra. Duke E. Pollard, “The Caribbean Court of Justice in Regional Economic Development” This Article can be found in the Caribbean Court of Justice- Issues and Perspectives (2001) Volume 1 at pg. 12. See pg. 19.

³¹⁹ Supra. Delano Franklyn, “We Want Justice- *Jamaica and the Caribbean Court of Justice*” at pgs. 23-24.

³²⁰ Supra. Duke E. Pollard, “The Caribbean Court of Justice in Regional Economic Development” by Duke E. Pollard. This Article can be found in the Caribbean Court of Justice- Issues and Perspectives (2001) Volume 1 at pg. 12. See pg. 20.

³²¹ “Caribbean Court of Justice- What it is What it does.” Prepared by Duke Pollard, Legal Consultant for the Caribbean Community Secretariat dated April 2000 at pg. 13.

³²² Ibid.

In the exercise of the CCJ's original jurisdiction, the doctrine of *stare decisis* has also found its place in the Revised Treaty. Article 221 states that judgments of the CCJ shall constitute legally binding precedents for parties in proceedings before the Court. The exception to this is where the judgments have been revised in accordance with Article 219 e.g. within 6 months of the discovery of some decisive fact unknown at the date of the judgment and in event 5 years from the date of the judgment.³²³

One can appreciate to an extent why the relevant decision makers imposed the doctrine of *stare decisis* upon the CCJ. Such a requirement was thought to be necessary to promote legal certainty and uniformity in decisions pertaining to trade disputes under the CSME. It was also thought that if the doctrine of *stare decisis* was absent in the CCJ that the regional investment climate would prove to be unattractive.³²⁴ The words of the Hon. Madame Justice Désirée Bernard, Judge of the CCJ, appear to be apt: "In any court the doctrine of *stare decisis* or judicial precedent is important for its stability and predictability."³²⁵

However the imposition of the doctrine of *stare decisis* does not come without any judicial mishaps. There are instances whereby Courts are loath to adopt a rigid approach to the *stare decisis* doctrine. It is beneficial at this point to have a closer look at some of these approaches.

3.5.1 The House of Lords Practice Statement and the approach of the Privy Council on binding precedents:

In July 1966, the House of Lords issued a Practice Statement (Judicial Precedent) which had the effect of empowering the Court to depart from previous decisions in circumstances where it appeared right to do so.³²⁶ In the recent House of Lords

³²³ Supra. The Hon. Mr. Justice Hayton "The Role of the Caribbean Court of Justice: An Overview" at pg. 8.

³²⁴ Supra. Duke E. Pollard, "The Caribbean Court of Justice-Closing the Circle of Independence" at pg. 46.

³²⁵ The Hon. Madame Justice Désirée Bernard, "The Caribbean Court of Justice and its relationship with the CARICOM Single Market" at pg.6. This article is available at:

<http://www.caribbeancourtsofjustice.org/speeches/bernard/05-The%20CCJ%20%20the%20CSME.pdf>

³²⁶ [1966] 1 W.L.R. 1234

decision of *Horton v. Sadler and another*, Lord Bingham of Cornhill adopted the House of Lords Practice Statement wholeheartedly.³²⁷ There Lord Bingham said:

“As made clear in the 1966 *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 former decisions of the House are normally binding. **But too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the development of the law. The House will depart from a previous decision where it appears right to do so.**” [My emphasis].³²⁸

This dictum of Lord Bingham was quoted with approval in the Privy Council case of *Gibson v. Government of the United States of America* which arose out of the Bahamas.³²⁹ This approval is not surprising given the Privy Council’s previous stance in the Jamaican case of *Lewis and others v. Attorney –General*.³³⁰ In that case, Lord Hoffmann said in his judgment (dissenting):

“I entirely accept that the Board is not, as a matter of law, bound by its previous decisions.”³³¹

These authorities illustrate that the House of Lords and also the Privy Council both do not apply the doctrine of *stare decisis* in a straight jacket. There is therefore room for flexibility in circumstances where it is appropriate.

³²⁷ [2007] 1 AC 307 at pg. 323 para. 29.

³²⁸ Ibid.

³²⁹ (2007) 70 WIR 34 at pg. 42 para. 22

³³⁰ (2000) 57 WIR 275.

³³¹ Ibid. pg. 308.

3.5.2 A further look at the doctrine of *stare decisis* and its place in international law:

Apart from the House of Lords and the Privy Council, other English Courts also had to grapple with the doctrine of *stare decisis* and the issue of binding precedents. For instance, in the English Court of Appeal case of Young v. Bristol Aeroplane Company, Limited it was held, *inter alia*, that the court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*.³³² In other words, a decision of a court is not a binding precedent where a statute or other relevant authority which would have affected the court's decision was not brought to its attention.³³³ There are also situations where subsequent developments had so altered public policy considerations that the correctness of an earlier decision was now in doubt.³³⁴

The fact that the CCJ applies international law in the exercise of its original jurisdiction is also fundamental. Traditionally international law applies the principle of *jurisprudence constant*, which speaks to the tendency of international tribunals to follow previous decisions on an issue, but establishes no requirement to do so.³³⁵ The views expressed by Lord Denning in the case of Trendtex Trading Corporation v. Central Bank of Nigeria are also instrumental on this point.³³⁶ There he was quoted as saying:

³³² [1944] K.B. 718.

³³³ Ibid.

³³⁴ Supra. Duke E. Pollard, "The Caribbean Court of Justice-Closing the Circle of Independence" pg. 98. There the author cited the authority of *Reg. v. Parole Board ex parte Wilson* [1992] QB 740. In that case, the English Court of Appeal did not follow an earlier decision because the liberty of the subject was involved and the interest of justice would have required otherwise.

³³⁵ Supra. Duke E. Pollard, "The Caribbean Court of Justice-Closing the Circle of Independence" pg. 97.

³³⁶ [1977] QB 529.

“International law knows no rule of *stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change...”³³⁷
[My emphasis].

We live in a world today where globalisation is at its peak and there are rapid changes in business culture, investment climate and technology. In order to effectively adapt to these changes, judicial pronouncements must keep abreast with commercial realities. Faced with such a dynamic situation, there will be times when the CCJ will have to tread very carefully when deciding whether or not to apply the doctrine of *stare decisis*. The CCJ, as an international tribunal, will therefore have to be cautious and avoid applying its judicial precedents blindly. This is especially so in a situation where the original jurisdiction of the CCJ is exclusive and its decisions cannot be appealed to a higher tribunal. In this context, it is worthwhile to mention the dictum of Stephenson L.J. (quoted from Sir Samuel Evans P.) in the case of *Trendtex Trading Corporation v. Central Bank of Nigeria*:

“Precedents handed down from earlier days should be treated as guides to lead and not as shackles to bind.”³³⁸

Having said this, it is contemplated that the doctrine of *stare decisis* would be applied flexibly in order to meet any changes which take place over a period of time.³³⁹ In the words of the Hon. Justice Duke Pollard, current CCJ Judge: “the CCJ will have to determine the scope of application of the doctrine of *stare decisis*.”³⁴⁰ Unfortunately, at the time of writing the CCJ has not presided over any matters pertaining to the

³³⁷ Ibid. Pg. 554 H.

³³⁸ [1977] QB 529 at pgs. 567H-568B. This quotation was originally made by Sir Samuel Evans P. in *The Odessa* (1915) P. 52, 61-62.

³³⁹ Supra. Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” pg. 97.

³⁴⁰ Ibid. pg. 98.

exercise of its original jurisdiction over the interpretation of the Revised Treaty.³⁴¹ As a result, there are no judicial records on showcase which illustrate how the CCJ deals with precedents in the exercise of its original jurisdiction. The CCJ must therefore ensure that the ultimate goal of judicial certainty does not encroach upon the development of the law pertaining to commercial transactions undertaken within the CSME.

3.6 LOCUS STANDI AND ACCESS TO THE CCJ BY PRIVATE ENTITIES

According to Article 211 of the Revised Treaty, the CCJ has compulsory and exclusive jurisdiction to hear and determine disputes between: (1) Member States party to the Agreement establishing the CCJ, (2) Member States and the Community and (3) referrals from national courts of Member States.³⁴² Article 222, also makes provision for persons, whether natural or juridical, to appear as parties in proceedings before the Court once **special leave** is attained. Such a provision is also found in Article XXIV of the Agreement establishing the CCJ. Under both Article XXIV and Article 222 of the Revised Treaty, a person or private entity *may* seek special leave to pursue a claim in the CCJ where they can establish:

- 1) That the Revised Treaty intended that a right conferred on a Contracting Party should enure (sic) to the benefit of such person directly and the person has suffered prejudice in respect of the enjoyment of the benefit.
- 2) The relevant Contracting Party has omitted or declined to espouse the claim or has consented to a private party action.

³⁴¹ The writer notes that on 3 April 2008, Trinidad Cement Limited (TCL) Guyana Incorporated filed an action in the Caribbean Court of Justice (CCJ) against the Guyana government for its failure to apply the common external tariff (CET) on cement sourced extra-regionally. The suit, which seeks millions of dollars in damages, may be heard by May 2008. See: "TCL files action in Caribbean Court of Justice over CET waiver" Starbroek news, 15 April 2008. This article is available at: <http://www.starbroeknews.com/?p=1360>

³⁴² The question of referrals will be dealt with below at paragraph 3.7.

- 3) That it is in the interest of justice for the private party to pursue or espouse the claim.³⁴³

In traditional international law only States, as subjects of international law, are accorded *locus standi* in proceedings before international tribunals.³⁴⁴ For example, Article 34(1) of the Statute of the International Court of Justice (ICJ) reads: “Only States may be parties in cases before the Court.”³⁴⁵ One exception to this rule worth mentioning is perhaps the European Union (EU). As we have seen in paragraph 3.3, the EU has a peculiar status of being a supranational entity with the power to make laws which have a direct effect on States and private entities.³⁴⁶ As a natural result, such private entities are accorded *locus standi* in relevant proceedings before the European Court of Justice (ECJ).³⁴⁷ This position is specifically provided for in Article 173 of the Rome Treaty which legislates directly for private entities in the European Union.³⁴⁸

The CCJ on the other hand is different. The Revised Treaty establishing the Caribbean Community does not create rights and obligations directly for private entities within the Community.³⁴⁹ Hence, there is no equivalent of the European Commission, which can make decisions on behalf of Member States.³⁵⁰ CARICOM, unlike the EU, does not have power to enact legislation which would have a direct

³⁴³ Supra. Rt. Hon. Mr. Justice de la Bastide, President of the CCJ, “The Caribbean Court of Justice as a Regional Court.”

³⁴⁴ Supra. Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” pg. 100.

³⁴⁵ See the ICJ website at: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II

³⁴⁶ Supra. Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” at pg. 44.

³⁴⁷ Ibid. pg. 100.

³⁴⁸ This Article states: “Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.”

³⁴⁹ Supra. Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” pg. 224.

³⁵⁰ Supra. The Rt. Hon. Mr. Justice de la Bastide, President of the CCJ, “The Caribbean Court of Justice as a Regional Court,” pg. 7.

effect on natural or juridical persons. However, it should be pointed out that in July 2007, the Heads of Government approved a proposal for the creation of a CARICOM Commission with “*Executive Authority in the implementation of decisions in certain defined areas.*”³⁵¹ If a CARICOM Commission comes into fruition it would be possible to implement decisions or enact legislation which may have a direct impact on a private entity.

As it presently stands, the CCJ is more consonant with traditional international law in that it does not accord private entities *locus standi* as a matter of right.³⁵² As we have seen, Article 222 of the Revised Treaty does not confer on private entities the right of *locus standi* before the CCJ. All the provision merely does is to empower the CCJ with the discretion to allow private entities to appear before it.³⁵³

In the ordinary course of events if a private entity is aggrieved under the Revised Treaty, the State of nationality concerned would have to espouse its cause in proceedings before the CCJ.³⁵⁴ If the State of nationality refuses or omits to espouse a claim, the CCJ *may* exercise its discretion to allow a private entity audience before it.

An alternative way for a private entity to acquire *locus standi* before the CCJ is by instituting proceedings concerning the interpretation or application of the Revised Treaty before a national court or tribunal. The private entity can then secure an audience before the CCJ through a referral of the particular issue by the national court to the CCJ.³⁵⁵ This procedure for referrals by a national court or tribunal is clearly stipulated under Article 214 of the Revised Treaty and is discussed below in the next paragraph.

There are a few provisions in the Revised Treaty, which if implemented into domestic law, will impact upon the rights and obligations for private entities. Examples

³⁵¹ Ibid.

³⁵² Supra. Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” pg. 223.

³⁵³ Ibid. pg. 100.

³⁵⁴ “Caribbean Court of Justice- What it is What it does.” Prepared by Duke Pollard, Legal Consultant for the Caribbean Community Secretariat dated April 2000 at pg. 14.

³⁵⁵ Supra. Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” pg. 223.

of such provisions are those relating to the removal of restrictions on the right of establishment, the provision of services and the movement of capital within the Community.³⁵⁶ As a result of this, one can appreciate why the drafters of the Revised Treaty and the Agreement establishing the CCJ decided that private entities should be accorded *locus standi* in proceedings before the CCJ only by special leave of the Court.³⁵⁷

3.7 REFERRALS TO THE CCJ BY A NATIONAL COURT:

The Revised Treaty also makes it obligatory for a national court or tribunal seized of an issue involving the interpretation or application of the Revised Treaty, to refer that particular issue to the CCJ. Article 214 of the Revised Treaty states:

“Where a national court or tribunal of a Member State is seized of an issue whose resolution involves a question concerning the interpretation or application of this Treaty, the court or tribunal concerned **shall, if it considers that a decision on the question is necessary to enable it to deliver judgment**, refer the question to the Court for determination before delivering judgment.” [My emphasis]

What this Article in effect does is to give a national court or tribunal the authority to refer questions involving the Revised Treaty to the CCJ for a preliminary ruling.³⁵⁸ This procedure is important as it creates an open dialogue between the referring court

³⁵⁶ See Articles 33, 37 and 40 of the Revised Treaty.

³⁵⁷ Supra. Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” pg. 225.

³⁵⁸ Sheldon A. McDonald, “Signposts to the Development of Judicial Institutions in the Caribbean Community: The Referral Procedure of the Agreement Establishing the Caribbean Court of Justice”. This article can be found in Caribbean Court of Justice- Issues and Perspectives (2001) Volume 1 at pg. 25. See pgs. 31-32.

and the CCJ which is responsible for the uniform interpretation of the Revised Treaty.³⁵⁹

When one carefully considers Article 214, one would appreciate that there may be some pitfalls which may be encountered. By using the mandatory word “shall”, it is clear that the drafters of Article 214 intended that a court or tribunal must refer a question of dispute once the question to be resolved “is necessary to enable it to deliver judgment.” At a first glance, this Article may be open to abuse and ultimately lead to a number of unnecessary referrals being made to the CCJ. In order to ensure that Article 214 does not lead to an inundation of referrals to the CCJ, certain policy considerations should be taken into account. Firstly, the national court or tribunal should consider the importance of the question or provision in the Revised Treaty being referred. Secondly, the national court should also consider whether there is reasonable doubt about the answer.³⁶⁰ With respect to the second consideration, it must be added that national courts should be dissuaded from referring matters to the CCJ where the Treaty provision clearly states what the answer should be or where the point raised has no legal significance.³⁶¹

It is noted that Article 214 of the Revised Treaty uses the mandatory word ‘shall.’ Article 214 therefore must be compared with Article 177(2) of the Rome Treaty. There the latter Article states:

“Where such a question [relating to the interpretation of the Rome Treaty] is raised before any court or tribunal of a Member State, that court or tribunal **may**, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.” [My emphasis]

³⁵⁹ Ibid.

³⁶⁰ European Court of Justice and Court of first Instance, “The future of the Judicial System of the European Union,” 2000 at pg. 13. This reference was quoted with approval in: Supra. Sheldon A. McDonald, “Signposts to the Development of Judicial Institutions in the Caribbean Community: The Referral Procedure of the Agreement Establishing the Caribbean Court of Justice.”

³⁶¹ Ibid.

The important difference with Article 177(2) of the Rome Treaty is that by using the permissive word ‘may,’ it gives the national court or tribunal complete discretion in referring a question to the European Court of Justice.³⁶² Despite this, the guidelines laid down by Lord Denning involving Article 177 of the Rome Treaty in the case of H.P. Bulmer v. Bollinger S.A. [1974] 2 All ER 1226 may also be of some relevance. These guidelines are as follows:

- 1) In determining whether a decision on the question of referral is necessary, the court or tribunal must conclude that it would **be impossible to deliver judgment without a decision.** [My emphasis].
- 2) Where the European Court of Justice (ECJ) has already decided the same point, the court or tribunal may act on the decision of the ECJ without referral.
- 3) Where the court or tribunal considers that question in issue leaves little room for doubt, the task is to apply the Treaty of Rome and not to seek the interpretation of it.³⁶³

As Article 214 of the Revised Treaty has not yet been invoked to date, national courts, tribunals and the CCJ should acclimatize themselves with the relevant considerations and guidelines outlined in relation to the referral of questions. It should however be pointed out that these guidelines and considerations referred to in this paper merely provide some insight into what a court or tribunal can take into account. The list is not meant to be exhaustive in any way. The scope of guidelines and considerations would undoubtedly expand once Article 214 becomes fully utilised and judicially tested.

³⁶² Supra. Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” pg. 95. See also the case of *HP Bulmer Ltd and another v. J Bollinger SA and others [1974] 2 All ER 1226* at pg. 1233 d.

³⁶³ See pgs. 1234g-1235d of the case.

3.8 OVERVIEW OF THE CCJ

As already highlighted, the CCJ is a unique Court in that it has the ability to exercise two concurrent jurisdictions: the appellate jurisdiction and the original jurisdiction. For the purpose of this paper, special emphasis is placed on the Court's role as an international tribunal in exercising its original and exclusive jurisdiction in interpreting and applying the Revised Treaty. The CCJ is therefore seen as an important adjunct to the CARICOM Single Market.³⁶⁴ By interpreting the provisions of the Revised Treaty, the CCJ plays an important role in protecting the guarantee given under the CSME for the free movement of goods, services, capital and the right of establishment.

In order to determine the true role of the CCJ as an international tribunal, the issues of binding precedents in the form of *stare decisis* and locus standi were discussed. Although the provisions dealing with such issues are subject to further judicial interpretation, it is fair to conclude that the CCJ in interpreting the Revised Treaty acts as an international tribunal. It should also be noted that besides the CCJ, the Revised Treaty offers a wide range of dispute settlement mechanisms. Such mechanisms include: good offices, mediation, consultations, conciliation and arbitration.³⁶⁵

Having said this, it goes without saying that the CCJ and the CSME are two indispensable entities. One cannot do without the other. The CCJ therefore has a determinative role to play in the further development of Caribbean jurisprudence and regional trade.³⁶⁶

³⁶⁴ Supra. Rt. Hon. Mr. Justice de la Bastide, President of the CCJ, "The Caribbean Court of Justice as a Regional Court," pg. 2.

³⁶⁵ See Article 188 of the Revised Treaty.

³⁶⁶ See the Preamble for the Agreement Establishing the Caribbean Court of Justice.

CHAPTER 4

THE LAW GOVERNING THE CARICOM CONTRACT AND THE IMPLEMENTATION OF THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

4.1 THE RULES OF PRIVATE INTERNATIONAL LAW AND THE LAW GOVERNING THE CARICOM CONTRACT

The emergence of the CSME would, without any doubt, lead to greater opportunities for regional trade within the Caribbean Community. Due to this, individual producers, business firms and organisations within CARICOM would now have to deeply engage themselves in cross-border transactions and the signing off of commercial contracts. The signing off of a commercial contract is very important as all the essential terms and conditions would be contained therein. Such terms and conditions would include for example: the name of parties, the quantity of goods being delivered, the time of delivery and the method of payment. As is customary with any type of contract, be it regional or international, the contract would often contain a dispute resolution clause. Such a clause will stipulate the methods the parties will adopt in order to amicably resolve a dispute involving a question of substantive law. Most contracts often provide for mediation or arbitration as a first option as a means in resolving such a dispute. If all attempts at mediation or arbitration fail, the parties would be constrained to resolve their dispute by litigating their matter via the court system. As the parties to the contract would come from different nationalities, the difficulty which an arbitral tribunal or court would have is identifying the proper law which governs the contract. In order to determine the proper law, the arbitral tribunal or

court can apply the principles of private international law (conflict of laws).³⁶⁷ By utilizing the principles of private international law, a court or arbitral tribunal will be able to ascertain what is the proper law governing a particular contract. As some countries have different private international law rules, the court or arbitral tribunal has the task of determining which country's private international rules apply.³⁶⁸ In this regard, a court will have no difficulty in applying the rules of private international law of its own territory. On the other hand, an arbitral tribunal, which has no *lex fori* (law of the forum), must make a conscious decision as to what private international law rules it must apply.³⁶⁹

4.1.1 Express choice of law by the parties:

There are however some instances when a court or arbitral tribunal can renounce the application of any private international law principles.³⁷⁰ A classic example is a case where the parties to a dispute have agreed upon the substantive law applicable to the merits of their dispute.³⁷¹ So for example, let us say there is a contractual dispute between a Guyanese furniture manufacturer and a St. Lucian importer. If both parties specifically choose Guyanese law as the law governing the contract it appears that the substantive law chosen (i.e. the Guyanese law) will be the proper law to apply. As Lord Wright said in his judgment in the Privy Council case of *Vita Food Products Inc. v. Unus Shipping Company Limited*:

³⁶⁷ Dr. Beda Wortmann, "Choice of Law by Arbitrations: The Applicable Conflict of Laws System" (1998) 14 *Arb. Int* 97.

³⁶⁸ Professor RH Christie and Mr. Offah Obale, "The Law Governing an International Construction Contract" [2007] ICLR 343.

³⁶⁹ *Ibid.*

³⁷⁰ *Supra.* Dr. Beda Wortmann, "Choice of Law by Arbitrations: The Applicable Conflict of Laws System"

³⁷¹ *Ibid.*

“It is now well settled that by English law...**the proper law of the contract is the law which the parties intended to apply.**” [My emphasis]³⁷²

As a result, in such a situation, a court or arbitrator does not have to rely on any private international law rules. However, not all private international law systems accept the freedom of the parties to choose a proper law without any restrictions.³⁷³ Although the principle of party autonomy is recognised in both common law and civil law systems, the freedom which each country permits is limited.³⁷⁴ So for instance, in the English system of private international law, a choice expressed by the parties must be ‘*bona fide* and legal’ and a merely ‘eccentric or capricious’ choice of law will have no effect.³⁷⁵ This principle was also gleaned from the *Vita Food Products Inc.* decision and would duly apply to the CARICOM common law countries.³⁷⁶ On this point, it is noted with interest, that the freedom of parties to choose a proper law is also recognised under Article 3 (1) of the EC Convention on the Law Applicable to Contractual Obligations (1980).³⁷⁷ Under this particular Article, the parties can even “select the law applicable to the whole or a part” of the contract in question.

4.1.2 Choice of law not expressed by the parties:

There may also be a situation where no express reference was made by the parties to the proper law governing the contract. One could use the same example with the Guyanese furniture manufacturer and the St. Lucian importer. The only difference in this case is that the parties to the agreement failed to mention the law which will govern the contract in the event of a dispute arising between them. In such a scenario, a

³⁷² [1939] AC 277. See pgs. 289-290.

³⁷³ Supra. Dr. Beda Wortmann, “Choice of Law by Arbitrations: The Applicable Conflict of Laws System.”

³⁷⁴ Ibid.

³⁷⁵ Ibid.

³⁷⁶ [1939] AC 277.

³⁷⁷ This Convention is also referred to as the Rome Convention and is only binding on EU countries.

court of law will have to infer what the proper law is given the surrounding circumstances. This issue was resolved in another Privy Council decision called *John Lavington Bonython and Others v. Commonwealth of Australia*.³⁷⁸ In that case, it was held that the proper law of the contract was “the system of law by reference to which the contract was made **or** that with which the transaction has **its closest or most real connexion** (sic).”³⁷⁹ In determining which system of law has the closest or most real connection, a court of law may take into consideration things such as: the place of contracting, the place of performance and the places of residence or business of the parties respectively.³⁸⁰

4.1.3 The Seat of the Arbitration – The JAMBAN/Supermarché example:

A situation may also arise where the parties to a contract have not expressly chosen the law governing the contract but have agreed the place where the arbitration would take place. Let us look at another practical example whereby a Jamaican banana company (called JAMBAN Ltd.) is exporting bananas to a supermarket in Haiti (called Supermarché Ltd.). Under the contract, the parties have not expressly chosen the law that would govern the particular agreement. However, both parties have inserted an arbitration clause selecting Jamaica as the seat of the arbitration in the event of a dispute arising. The bananas are shipped to Haiti and agents for Supermarché Ltd. collect same at the port at the appointed time. Upon inspecting the bananas, agents for Supermarché Ltd. claim that the bananas are of inferior quality. They therefore request from JAMBAN Ltd. a reduced price. JAMBAN Ltd. refuses to accept a reduced price on the basis that the bananas were delivered on time and they were of good quality. The dispute goes to arbitration. The issue which arises here is whether by choosing Jamaica as the seat of arbitration, the parties impliedly agreed or accepted that the law governing the contract would be Jamaican law. In this practical situation, it is noted

³⁷⁸ [1951] AC 201

³⁷⁹ Ibid. *per* Lord Simonds at pg. 219.

³⁸⁰ *In re United Railways of the Havana and Regla Warehouse Ltd* [1960] Ch. 52 at pg. 91.

that the two jurisdictions used have two contrasting systems of law i.e. Jamaica (common law) and Haiti (French civil law).

The House of Lords decision of *Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA* would be helpful on this point.³⁸¹ In that case, it was held that an agreement to refer disputes to arbitration in a particular country was not a conclusive indication that the law of that country was the proper law of the contract.³⁸² As Lord Morris said in his judgment:

“An agreement to refer disputes to arbitration in a particular country may carry with it, and is capable of carrying with it, an implication or inference that the parties have agreed that the law governing the contract (as well as the law governing the arbitration procedure) is to be the law of that country. **But I cannot agree that this is a necessary or irresistible inference or implication...**”³⁸³ [My emphasis].

The inescapable conclusion to be drawn from this authority is that the choice of the place of arbitration is not an overwhelming factor when determining the proper law of a contract. The arbitration clause must therefore be considered together with the rest of the contract and the relevant surrounding circumstances.³⁸⁴ In deciding what the other relevant surrounding circumstances are, the House of Lords applied the *Bonython* test i.e. which country or system of law the contract has the closest connection.³⁸⁵

Applying this reasoning to our JAMBAN/ Supermarché example, the mere fact that the place of arbitration is Jamaica does not necessarily imply that the proper law to be applied is Jamaican law. There may be many reasons why Jamaica was chosen as the seat of the arbitration. One reason may be that the parties had confidence in the

³⁸¹ [1970] 3 All ER 71.

³⁸² Ibid.

³⁸³ Ibid. pg. 77j

³⁸⁴ *Compagnie d'Armement Maritime SA v. Compagnie Tunisienne de Navigation SA* [1970] 3 All ER 71.

³⁸⁵ Ibid. pg 74 d-e.

arbitrators in Jamaica who would have been conversant in both Jamaican law and a foreign system of law. As a result, in determining what the proper law is a court of law must consider other relevant factors such as: the place of performance and the currency used for payment. In closing, it should be mentioned that even though a House of Lords decision is not binding on CARICOM common law jurisdictions, such decisions are treated as being highly persuasive.

4.2 THE MODERN LEX MERCATORIA

4.2.1 A brief history of the modern lex mercatoria:

The modern lex mercatoria also known as transnational law, is often defined as the law of merchants. As the name suggests the modern lex mercatoria is relatively a novel concept. Despite being a novel concept, the history of the lex mercatoria dates as far back as the medieval days. During that time, medieval merchants who wandered from “fair to fair” were not governed by domestic laws, but by their own lex mercatoria or merchant law.³⁸⁶ In 1622, a famous merchant – Mr. Gerard Malynes defined the lex mercatoria as ‘the customary law of merchants’ which is ‘more ancient than any written law.’³⁸⁷ For this reason, the affairs of commerce and international trade are regulated by their own unique system of law: known as the ‘lex mercatoria’.³⁸⁸ The lex mercatoria is therefore seen as an ensemble of general principles and rules, which is detached from any domestic legal system.³⁸⁹

4.2.2 The lex mercatoria and the UNIDROIT Principles

There are many instances whereby parties to a contract, arbitrators or a court of law choose a law which is unconnected to a particular country. The question of whether the

³⁸⁶ Steven E. Sachs, “From St. Ives to Cyberspace: The Modern Distortion of the Medieval ‘Law Merchant’” (Yale University Law School).

³⁸⁷ Professor Dr. Klaus Peter Berger, LL.M., “The New Law Merchant and the Global Market Place: A 21st Century view of Transnational Commercial Law” (Centre for Transnational Law (CENTRAL), University of Cologne, Germany)

³⁸⁸ Ibid.

³⁸⁹ Ibid.

lex mercatoria actually exists has been the subject of much debate. The International Institute for the Unification of Private Law (also known as UNIDROIT) was responsible for the codification of a number of principles on international commercial contracts. These principles became known as the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles). The first edition of the UNIDROIT Principles was published in 1994. A second enlarged edition was later published in 2004.³⁹⁰ At the time of writing, there is a Working Group engaged which is preparing a third edition of the UNIDROIT Principles.³⁹¹

For the most part, the UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems.³⁹² The objective of the UNIDROIT Principles therefore is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied.³⁹³ So for instance, the UNIDRIOT Principles (2004) covers areas such as: formation of contracts (Chapter 2), validity of contracts (Chapter 3) and performance (Chapter 6).³⁹⁴ The UNIDROIT Principles also adopt the lex mercatoria wholeheartedly. In the Preamble it states that the Principles “may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.”³⁹⁵

Membership to UNIDROIT is limited to those States which have acceded to the UNIDROIT Statute.³⁹⁶ There are currently 61 member States which include: The United Kingdom, the United States of America and Canada. Unfortunately there are no CARICOM countries which are a member of UNIDROIT.³⁹⁷ Despite this fact, one of

³⁹⁰ See: <http://en.wikipedia.org/wiki/UNIDROIT>

³⁹¹ For more on this Working Group see:

<http://www.unidroit.org/english/workprogramme/study050/wg03/wg-2007.htm>

³⁹² See the introductory part of the UNIDROIT Principles at:

<http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>

³⁹³ Ibid.

³⁹⁴ See:

<http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>

³⁹⁵ Ibid.

³⁹⁶ See: <http://www.unidroit.org/english/members/main.htm>

³⁹⁷ Ibid.

the purposes of this dissertation is to ascertain whether the concept of the lex mercatoria has found its way into the legal systems of the CARICOM countries. In order to address this issue, I would first discuss whether the lex mercatoria forms part of English law.

4.2.3 The lex mercatoria and English case law:

The issue as to whether the lex mercatoria exists in England has also been the subject of much debate. Within CARICOM, 12 of the 15 territories were former British colonies. Montserrat, which is not included in these 12 territories, is a British overseas territory. In the circumstances, English case law (common law) on the subject would have a very persuasive effect as to whether the lex mercatoria forms part of the law of these CARICOM countries.

Prior to 1978, English courts consistently rejected the validity of clauses calling for a non-legal standard.³⁹⁸ The authority of *Orion Compania Espanola De Seguros v. Belfort Maatschappij Voor Algemene Verzekering* ('Orion' case) clearly supports the pre-1978 English position.³⁹⁹ In that case the respondents, a Belgian insurance company, sought to set aside an arbitration award made by an umpire in favour of the claimants.⁴⁰⁰ There the arbitration clause read:

“...The Arbitrators and Umpire are relieved from all judicial formalities and may abstain from following the strict rules of law. They shall settle any dispute under this Agreement according to an equitable rather than a strictly legal interpretation of its terms and their decision shall be final and not subject to appeal.”⁴⁰¹

³⁹⁸ David W. Rivkin, “Enforceability of Arbitral Awards based on *Lex Mercatoria*”, *Arbitration International*, Volume 9, No. 1 at pg. 67.

³⁹⁹ [1962] 2 Lloyd’s Rep. 257 (Q.B. Com. Ct.)

⁴⁰⁰ Ibid. pg. 258.

⁴⁰¹ Ibid. pg. 262.

The claimants on the other hand argued that the Court should not exercise its discretion to set aside the award based on the fact that the parties had contracted for an equitable standard. As a result, the Court should respect the parties' agreement by refraining from reviewing the umpire's equitable construction of the contract or to treat that equitable construction as a question of law.⁴⁰² In response to this proposition Megaw J said:

“..it is the policy of the law in this country that, in the conduct of arbitrations, arbitrators **must in general apply a fixed and recognizable system of law**, which primarily and normally would be the law of England, and they cannot be allowed to apply some different criterion such as the view of an individual arbitrator or umpire on abstract justice or equitable principles...”⁴⁰³ [My emphasis]

In support of his decision Megaw J relied heavily on an earlier English Court of Appeal decision of *Czarnikow v. Roth, Schmidt and Company*.⁴⁰⁴ Reliance was placed upon the judgment of Justice Banks where he said:

“To release real and effective control over commercial arbitrations is to allow the arbitrator, or the Arbitration Tribunal, to be a law unto himself, or themselves, to give him or them a free hand to decide according to law or not according to law as he or they think fit, in other words to be outside the law...”⁴⁰⁵

⁴⁰² Supra. David W. Rivkin, “Enforceability of Arbitral Awards based on *Lex Mercatoria*”

⁴⁰³ [1962] 2 Lloyd's Rep. 257 at pg. 264.

⁴⁰⁴ [1922] 2 K.B. 478.

⁴⁰⁵ [1962] 2 Lloyd's Rep. 257 at pg. 263, [1922] 2 KB 478 at pg. 484

In 1978, the English Court of Appeal, arguably, first upheld an arbitration clause which applied *lex mercatoria* principles. This was in the case of *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.*⁴⁰⁶ In that case Lord Denning stated:

“...I am prepared to hold that this arbitration clause, in all its provisions, is valid and of full effect, including the requirement that the arbitrators shall decide on equitable grounds rather than a strict legal interpretation.”⁴⁰⁷

The Court of Appeal decision of *D.S.T v. Rakoil* also cited with approval the dicta of Lord Denning in the *Eagle Star* case (above).⁴⁰⁸ In *D.S.T v. Rakoil* Donaldson M.R. produced three questions which a Court must apply its mind to when confronted with a clause which adopts a foreign system of law. These questions are: 1) Did the parties intend to create legally enforceable rights and obligations? 2) Is the resulting agreement sufficiently certain to constitute a legally enforceable agreement? and 3) Would it be contrary to public policy to enforce the award using the coercive powers of the State?⁴⁰⁹ The Court in *D.S.T v. Rakoil* held the opinion that an arbitral tribunal could apply foreign law or international law “where the parties so agreed”.⁴¹⁰

The 1987 ruling of *D.S.T v. Rakoil* appeared to suggest that English Courts were now accepting the principles of a *lex mercatoria* or some foreign system of law which was unconnected to any party in a dispute. However, the 2004 English Court of Appeal decision of *Shamil Bank of Bahrain v. Beximco Pharmaceuticals Ltd.* (‘Shamil Bank’ case) unfortunately regressed from this position.⁴¹¹ In the *Shamil Bank* case, the Court had to interpret two Exchange in Satisfaction and User Agreements (ESUAs) which

⁴⁰⁶ [1978] 1 Lloyd’s Rep. 357.

⁴⁰⁷ Ibid. pg. 362.

⁴⁰⁸ *D.S.T. v. Rakoil* [1987] 2 Lloyd’s Rep.246 , 253.

⁴⁰⁹ Ibid. at pg. 253-254.

⁴¹⁰ Ibid. at pg 253.

⁴¹¹ [2004] 2 Lloyd’s Rep. 1 (CA).

were issued by the claimant bank. The two ESUAs contained the following choice of law clause:

“Subject to the principles of the Glorious Sharia’a this Agreement shall be governed by and construed in accordance with the laws of England.”

In determining what the exact choice of law was, the Court relied on the provisions of the EC Convention on the Law Applicable to Contractual Obligations 1980 (also known as the Rome Convention). In doing so, the Court took into account Article 1.1 of the Rome Convention which stated that the rules of the Convention would apply to contractual obligations involving a **“choice between the laws of different countries”**. On this point, Lord Justice Potter opined that Article 1.1 is not applicable to a choice of law between the law of a country and a non-national system of law such the *lex mercatoria* or the law of Sharia.⁴¹² In essence the Court of Appeal reasoned that the Rome Convention only contemplates and sanctions the choice of law of a country.⁴¹³ There is therefore no place for the *lex mercatoria* in the Rome Convention.

Besides being a decision of a high level court in England, it is very unlikely that the authority of *Shamil Bank* would apply to any English speaking CARICOM country. The reason being is that the ruling of the Court in *Shamil Bank* relied heavily upon the interpretation of the Rome Convention which is only applicable to EU States. The writer therefore holds the view that the *Shamil Bank* case is not binding on a Court situated in an English speaking common law CARICOM country.

In 2007 there was another turn in the thinking as to how English judges view the whole notion of the *lex mercatoria*. This was highlighted in the House of Lords decision of *West Tankers Inc. v. RAS Riunione Adriatica di Sicurta SpA and others*.⁴¹⁴ There Lord Hoffmann said in his judgment:

⁴¹² Ibid. pg. 11 at paragraph 48

⁴¹³ Ibid.

⁴¹⁴ [2007] UKHL 4. This was an appeal from [2005] EWHC 454 (Comm).

“The choice of arbitration may affect the substantive rights of parties, giving the arbitrators the right to act as *amiable compositeurs*, apply broad considerations, **even a *lex mercatoria* which does not wholly reflect any national system of law.**”⁴¹⁵ [My emphasis]

Lord Hoffmann’s views (above) must be contrasted with the decision of the Court of Appeal in the *Shamil Bank* case. The decision of the *Shamil Bank* case is founded on the proposition that Articles 1.1, 3.1 and 3.3 of the Rome Convention prohibits a **court** from recognising a choice of transnational law or a *lex mercatoria*.⁴¹⁶ However, the *dictum* of Lord Hoffmann in the *West Tankers Inc.* case refers specifically to a choice of law under an arbitration and **not** a court of law. Article 1.2 (d) of the Rome Convention makes it clear that the Convention does not apply to arbitration agreements. As a result, an arbitration tribunal is not obliged to apply English rules of private international law (which includes the decision of the *Shamil Bank* case).⁴¹⁷ Following this line of reasoning, Lord Hoffmann’s *dictum* in the *West Tankers Inc.* case does not necessarily conflict with the decision of *Shamil Bank*.

The issue which one must therefore consider is whether this view expressed by Lord Hoffmann is binding on an English speaking CARICOM Court. This issue would be answered in the negative for two reasons. Firstly, as stated previously, House of Lords decisions are not binding on courts in the Commonwealth Caribbean but are merely persuasive. Secondly the view expressed by Lord Hoffmann was simply *obiter* and not meant to be the *ratio decidendi* of the case. However, Lord Hoffmann’s *dictum* should not be totally cast aside as it *may* prove to be relevant in the Commonwealth Caribbean from an arbitration perspective.

⁴¹⁵ See para. 17

⁴¹⁶ See pg. 11 at paragraph 48 of the *Shamil Bank* case.

⁴¹⁷ Supra. Professor RH Christie and Mr. Offah Obale, “The Law Governing an International Construction Contract” [2007] ICLR 343 at pg. 348.

4.2.4 The *lex mercatoria* and the Revised Treaty of Chaguaramas:

From the authorities cited above, it is a bit uncertain as to how an English Court, post-*West Tankers Inc.*, will deal with an arbitration clause or agreement containing the *lex mercatoria* or some non-national system of law. However the Revised Treaty provides some degree of certainty as to how the CCJ will deal such an agreement. As mentioned in Chapter 3 of this dissertation, Article 217 (3) empowers the CCJ to decide a dispute “*ex aequo et bono* **if the parties so agree.**” In essence this means that the CCJ when acting in its original jurisdiction can resort to general or equitable principles or even a *lex mercatoria* when resolving disputes under its original jurisdiction.⁴¹⁸ This point is very crucial as it recognises the possible use by the CCJ of a *lex mercatoria* in determining regional trade disputes.

4.3 AN INTRODUCTION TO THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1980 (CISG) AND ITS MEMBER STATES

The United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG) creates a uniform law for the international sale of goods.⁴¹⁹ The CISG is an important document since it establishes a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the contract. The CISG was developed by the United Nations Commission on International Trade Law (UNCITRAL) and was signed in Vienna in 1980.⁴²⁰ The CISG actually came into force as a multilateral treaty on 1 January 1988, after being ratified

⁴¹⁸ Supra. Duke E. Pollard, “The Caribbean Court of Justice-Closing the Circle of Independence” pg. 42-43.

⁴¹⁹ John Felemegas, “The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation”

⁴²⁰ See:

http://en.wikipedia.org/wiki/United_Nations_Convention_on_Contracts_for_the_International_Sale_of_Goods

by eleven countries.⁴²¹ At the time of writing, 72 countries have ratified the CISG. These 72 countries which account for a significant proportion of the world's trade include: Australia, China, France, Germany, Lesotho, Netherlands and the United States. Quite interestingly Cuba and St. Vincent and the Grenadines are the only two Caribbean nations which have acceded to the CISG.⁴²² As seen earlier, Cuba which is a Spanish speaking Caribbean nation and a civil law jurisdiction is not a member of CARICOM. St. Vincent and the Grenadines is the sole CARICOM State which has acceded to the CISG and brought the Convention into force.⁴²³ Although St. Vincent acceded to the CISG on 12 September 2000 and it was entered into force on 1 October 2001, the Convention has not yet been implemented into domestic legislation. As it presently stands, the old colonial Sale of Goods Act of 1919 remains in force in St. Vincent.⁴²⁴ Notwithstanding this, businessmen in St. Vincent can still implement the CISG into their commercial contracts as St. Vincent is still a Contracting party under international law. In any event, one of the most fundamental principles of the CISG is the principle of party autonomy. Thus, parties whose contract is not governed by the CISG may subject their contract to the CISG by agreement.⁴²⁵

There are, however a few major trading countries which have not ratified the CISG. These States include Brazil, India, Japan, South Africa and the United Kingdom. Despite this, the CISG is still seen as the backbone of international trade in that it governs more than 70% of all international trade transactions.⁴²⁶

⁴²¹ Ibid. The original 11 nations which adopted the CISG were Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, United States, Yugoslavia and Zambia.

⁴²² The CISG entered into force in Cuba and St. Vincent and the Grenadines on 1 December 1995 and 1 October 2001 respectively. For more information on the Status of the CISG and its Member States see: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

⁴²³ St. Vincent and the Grenadines is hereinafter referred, for simplicity sake, as "St. Vincent".

⁴²⁴ The commencement date of the Sale of Goods Act is 24 March 1919. The Act can be found in the Revised Laws of St. Vincent and the Grenadines (1990), Cap 115.

⁴²⁵ Charl Hugo, "The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective" (University of Stellenbosch) (1999) 11 SA Merc LJ pg. 1 at pg. 25.

⁴²⁶ Lisbeth Bach Christiansen, "CISG- what risks does it involve to the seller and how does he secure against them? - a practical guide" (University of Cape Town).

The CISG has been regarded as a success for UNCITRAL as the Convention has since been accepted by States from ‘every geographical region, every stage of economic development and every major legal, social and economic system’.⁴²⁷ The emergence of the CISG forms what is known as a new *lex mercatoria* which is embodied in codes and conventions. This must be distinguished with the old *lex mercatoria* which is based on usage and practice.⁴²⁸

4.3.1 A look at some provisions of the CISG:

4.3.1.1 PART I: Sphere of Application and General Provisions

Article 1 of the CISG sets out the general rule as to when the CISG would apply. Article 1 (1) of the CISG states:

“This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.”

Article 1 (1) essentially lists three criteria which must be satisfied for the CISG to apply.⁴²⁹ These criteria are: 1) the nature and subject matter of the contract (‘sale of goods’), 2) the internationality of the contract and 3) the connection with the contracting state or states.⁴³⁰ With respect to the first criterion, it is noted that the word “sale” is not defined in the CISG. Article 53 however stipulates that the buyer must ‘pay the price for the goods and take delivery of them.’ The dominant view of the legal commentators is that the word ‘price’ must be money and that barter agreements are

⁴²⁷ Supra. John Felemegas, “The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation.”

⁴²⁸ Ibid.

⁴²⁹ Supra. Charl Hugo, “The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective” (University of Stellenbosch) pg. 4.

⁴³⁰ Ibid. pg. 4.

excluded.⁴³¹ The word ‘goods’ is interpreted flexibly and widely and refers to tangible movables.⁴³² It includes commodities such as oil and gas which is an important factor for Trinidad and Tobago which is rich in this particular natural resource.⁴³³ The CISG however does not apply to the sale of goods bought for personal, family or household use, goods bought by auction and execution, stocks, ships, vessels, aircraft and electricity.⁴³⁴

The second criterion concerns the internationality of the contract. Thus, the main requirement here is that the places of business must be in different States. That being said, the CISG would still apply even if the formation and the execution of the contract took place in a single State.⁴³⁵ Furthermore for the CISG to be applicable, the fact that the parties have their places of business in different States must appear: 1) from the contract or from any dealings between the parties or 2) from the information disclosed by the parties at any time before the conclusion of the contract.⁴³⁶

This paper will now turn to the third criterion: the connection with the contracting States. For the CISG to apply, the different States must **both** be Contracting States. This is clearly provided for under article 1(1) (a). The CISG may also apply where the rules of private international law lead to the application of the law of a Contracting State (article 1(1) (b)). This latter situation would arise when one State is a Contracting party to the CISG. As a result of this, under article 1(1) (b), the rules of private international law become extremely important.⁴³⁷

With respect to article 1(1) (b), it may be worth considering a practical scenario. Let us say for example a nutmeg farmer operating out of Grenada (a non-contracting CISG State) enters in an agreement to sell 2,000 kilograms of nutmeg to a manufacturing company operating out of France (a contracting CISG State). If a

⁴³¹ Ibid. pg. 4.

⁴³² Ibid pg. 6

⁴³³ Ibid. pg. 6-7.

⁴³⁴ Article 2 of the CISG.

⁴³⁵ Ibid.

⁴³⁶ Article 1(2) of the CISG.

⁴³⁷ Supra. Charl Hugo, “The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective” (University of Stellenbosch) pg. 9.

dispute arises between the parties and the rules of private international law leads to the application of French law, the forum hearing the dispute must apply the CISG. This is so even though Grenada has not acceded or adopted the CISG. Such a situation illustrates a classic example whereby CARICOM nations (with the exception of St. Vincent) may be adopting the CISG unknowingly through the ‘backdoor’.

4.3.1.1 (a) The Article 95 reservation

The effect of article 1(1) (b) proved to be somewhat controversial. This led to the compromise in article 95 of the CISG.⁴³⁸ Article 95 stipulates that a State *may* declare at the time of the deposit of its instrument of ratification, acceptance or accession that it would not be bound by article 1(1) (b). This option was exercised by countries such as the United States, China, Czech Republic, Singapore, Slovakia and interestingly St. Vincent.⁴³⁹ By excluding the effect of article 1(1) (b) of the CISG, it *appears* these States have accepted that the CISG would only apply if all the parties to an international contract are contracting States (article 1 (1) (a)) or by agreement.

Let us again use an example which can be applied in a CARICOM context. A juice manufacturer in St. Vincent enters into a contract to export 1,000 boxes of its natural fruit juice to a supermarket in Germany (a contracting State). A dispute arises under this contract and the forum hearing this dispute is a St. Vincent court. The St. Vincent court agrees that the rules of private international law lead to the application of the law of St. Vincent. As recalled above, article 1 (1) (b) does not apply to St. Vincent as they have made a section 95 declaration. The consequence of this is that a St. Vincent forum is not bound to apply the CISG, but its own domestic law. Assume now for example that a German court has jurisdiction and is presiding over the dispute. The issue to be decided is whether this German court must apply St. Vincent law. Given this fact scenario, it could be argued that the private international law designates that the

⁴³⁸ Ibid.

⁴³⁹ See status of all countries at:

http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html

contract is to be governed by the law of St. Vincent and since St. Vincent is a 'contracting state' the CISG should apply. If this argument is accepted then this would render article 1 (1) (b) of the CISG superfluous. Despite this, Charl Hugo, a South African Professor has argued that the better view is that a State which has taken the article 95 option is not to be regarded as a 'contracting state' for the purposes of article 1 (1) (b).⁴⁴⁰ This view was adopted based on the spirit of the other reservations provided in article 92 and 93 CISG. For e.g. article 92 of the CISG, which deals with the declarations excluding the application Part II and Part III of the Convention, states:⁴⁴¹

“(1) A Contracting State may declare at the time signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II and Part III of this Convention **is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention...** [My emphasis].

With all due respect, I do not entirely agree with the argument put forward by the learned Professor Charl Hugo because unlike article 92, article 95 does not **expressly** set out that a State which makes a declaration excluding the application of article 1 (1) (b) would not be considered a contracting state under within article 1 (1) of the CISG. If this was desired, it would have been expressly catered for and inserted by the drafters. As a consequence, the writer is of the opinion, that, in the absence of any express wording in section 95, St. Vincent (and the other countries which have made a

⁴⁴⁰ Supra. Charl Hugo, “The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective” (University of Stellenbosch) pg. 10.

⁴⁴¹ Part II and Part III of the CISG deal with the formation of the contract and sale of goods respectively.

section 95 declaration) is still considered to be a contracting state under article 1 (1) (a) and (b) of the CISG. Thus in our Germany/St. Vincent juice example, a forum would still have to apply rules of private international law. If the rules of private international law dictate that the law governing the contract is St. Vincent law, then it can be persuasively argued that the CISG, being the law of St. Vincent, should be applied. As a consequence, the effect of St. Vincent making an article 95 declaration *may* be rendered superfluous.

4.3.1.1 (b) General Provisions

There are some general provisions under Part I of the CISG which are worth mentioning. Article 6 gives contracting parties some sort of flexibility as it allows them to exclude, derogate or vary the effect of the CISG provisions.⁴⁴² Article 7 (1) stipulates that in interpreting the Convention regard must be had to “its international character and to the need to promote uniformity in its application.” Article 7 (1) also recognises the need for parties to observe “good faith in international trade.” The concept of good faith is not unique to the CISG but is also found in other international instruments such as the UNIDROIT Principles.⁴⁴³ Despite the codification of the concept of good faith in these international instruments, there is still a challenge in that good faith is not uniformly interpreted in every legal system.⁴⁴⁴ For instance, English law imposes an objective standard of good faith.⁴⁴⁵ On the other hand, French law (e.g. Haiti) imposes a more subjective standard of good faith.⁴⁴⁶

Article 7(2) of the CISG provides for matters which are not expressly settled under the Convention to be “settled in conformity with the general principles on which it is

⁴⁴² Article 6 of the CISG provides: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”

⁴⁴³ Article 1.7 of the UNIDROIT Principles of International Contracts 2004 states: “Each party must act in accordance with good faith and fair dealing in international trade.”

⁴⁴⁴ RH Christie, “Our Law of Contract and the Modern *Lex Mercatoria*”– Essays in Honour of AJ Kerr at pg. 59.

⁴⁴⁵ “A thing is deemed to be done in good faith when it is in fact done honestly, whether it is done negligently or not.” - Halsbury’s Laws of England (4th ed.), Vol 41. para 748

⁴⁴⁶ Supra. RH Christie, “Our Law of Contract and the Modern *Lex Mercatoria*’ pg. 64.

based.” This particular provision not only accepts that there will be gaps in the CISG, but also recognises the role of general principles, or perhaps a *lex mercatoria* in the settling of disputes. In order to fill in these gaps in the CISG, reliance may be placed on other international instruments such as the UNIDROIT Principles. In fact the Preamble of the UNIDROIT Principles specifically states that it “*may* be used to interpret or supplement international uniform law instruments.”

Article 11 is also a very interesting article in that it reduces the formality in which an international contract is to be drawn up. This article provides:

“A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.”

As a consequence of this article, it is not mandatory under the CISG for a contract to be made in writing. Thus it is possible under the CISG for a multi-million dollar international sale of goods contract to be concluded over the telephone or via email. The first advantage of such an article is that it would encourage the use of modern day technology in the conclusion of a contract. The second advantage is that it would permit international businessmen, working under time constraints, to conclude contracts in a quick, effective and efficient manner. However, a contracting party *may* make a declaration excluding the applicability of article 11, if their legislation requires contracts of sale to be evidenced by writing.⁴⁴⁷ That being said, the implementation of article 11 would not pose a severe challenge for common law English-speaking CARICOM jurisdictions. This is so because a contract in such jurisdictions can be created orally once it can be proved that there was an agreement (offer and acceptance), an intention by the parties to create legal relations and consideration.⁴⁴⁸

⁴⁴⁷ See article 12 and 96 of the CISG.

⁴⁴⁸ Halsbury’s Laws of England (4th ed.), Vol. 9, para. 224.

4.3.1.2 PART II: Formation of the Contract

4.3.1.2 (a) Acceptance by Post

One of the important issues dealt with under Part II of the CISG is the issue as to when an acceptance of an offer becomes effective. Article 18 (2) of the CISG states:

“An acceptance of an offer becomes effective **at the moment the indication of an assent reaches the offeror**. An acceptance is **not** effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time...”
[My emphasis]

The principle reflected in article 18(2) reflects the receipt rule i.e. the contract is not formed until the acceptance reaches the person who made the offer. The justification behind the receipt rule is that the risk of transmission is better placed on the person accepting the offer (offeree) since it is he who chooses the communication.⁴⁴⁹ That means that the offeree would know that the chosen means of communication would have been subject to special risks or delays.⁴⁵⁰ The thinking behind the receipt rule is very much a civil law approach and would be accepted in CARICOM countries such as Haiti and Suriname.⁴⁵¹ This receipt rule however departs from the English common law position which prefers the dispatch rule. Under the dispatch rule, a contract is concluded when the letter of acceptance is posted.⁴⁵² Thus, if the English common law CARICOM jurisdictions choose to implement the CISG, they would have to pay particular attention to article 18 (2) and the receipt rule. In any event, due to the modern unreliability of the post, the receipt rule may be more favoured by most States.

⁴⁴⁹ See comment 4 in article 2.1.6 of the UNIDROIT Principles.

⁴⁵⁰ Ibid.

⁴⁵¹ Supra. RH Christie, “Our Law of Contract and the Modern *Lex Mercatoria*” pg. 66.

⁴⁵² *Adams v. Lindsell* (1818) 1 B & Ald 681 or 106 English Reports pg. 250.

4.3.1.2 (b) Irrevocable offers

Article 16 of the CISG highlights the circumstances in which an offer can and cannot be revoked. With respect to the irrevocability of an offer article 16 (2) stipulates that an offer cannot be revoked:

- “(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
- (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance of the offer.”

So for instance, let us use an example whereby a businessman makes an offer on a Sunday and expresses that such an offer will be open until Friday at noon. An honest business person would expect that such an offer will be open until Friday at 12.00.pm. On the face of this, it would be unjust if such an offer was to be revoked before Friday lunch time. Article 16 (2) (a) of the CISG therefore promotes the reasonable expectations of an honest businessman.⁴⁵³ This position under the CISG is not the same as the English common law which allows a revocation to be possible and effective at any time before acceptance.⁴⁵⁴ This is so even if the offeror has declared that he is ready to keep the offer open for a specified time.⁴⁵⁵ Under the English common law, the only way an offeror is bound to keep the contract open until a given date is if such a date is specified in a separate contract.⁴⁵⁶ The end result of the English common law, which applies to the English-speaking CARICOM countries, is therefore harsher than article 16 (2) (a) of the CISG.

⁴⁵³ Supra. RH Christie, “Our Law of Contract and the Modern *Lex Mercatoria*” pg. 66.

⁴⁵⁴ Cheshire, Fifoot & Furmston, “Law of Contract” 13th ed. (Butterworths) pg. 58.

⁴⁵⁵ Halsbury’s Laws of England (4th ed., Reissue), Vol. 9(1) para. 644.

⁴⁵⁶ Routledge v. Grant (1828) 4 Bing. 653 or 130 English Reports pg. 920.

4.3.1.3 Avoidance and fundamental breach under the CISG

One of the more important provisions in the CISG, are those pertaining to the rules in which an injured party can ‘put an end to the contract’ i.e. the remedy of avoidance.⁴⁵⁷ One way in which a buyer or seller can elect to avoid a contract, is if there was a ‘fundamental breach’ of the contract.⁴⁵⁸ Article 25 defines a fundamental breach as:

“A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless that party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.” [My emphasis]

The pertinent issue which normally arises is what amounts to a ‘fundamental breach’ under article 25. As one leading academic on the subject said, “article 25 defines fundamental breach in terms of (foreseeable) ‘substantial detriment.’⁴⁵⁹ Thus, the injured party must allege and prove that he has suffered a detriment which **substantially** (perhaps even more than ‘material’) deprives him of what he is entitled to expect under the contract.⁴⁶⁰ In addition to this, the detriment must also be one in which the breaching party ought to have reasonably foreseen.⁴⁶¹ As a consequence, whether an injured party suffers a ‘substantial’ detriment and whether such detriment is ‘foreseeable’ by the other party requires a concrete evaluation of the circumstances of a

⁴⁵⁷ See Part III Chapter 1 of the CISG.

⁴⁵⁸ See article 49 (avoidance for seller’s breach) and article 64 (avoidance for buyer’s breach).

⁴⁵⁹ Joseph Lookofsky, “The 1980 United Nations Convention on Contracts for the International Sale of Goods: Article 25: Avoidance and Fundamental Breach.” (excerpt).

<http://cisgw3.law.pace.edu/cisg/biblio/loo25.html>

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid.

particular case.⁴⁶² In order to determine what amounts to a fundamental breach under article 25, two situations will be considered: 1) late delivery of goods by the seller and 2) late performance by the buyer.

4.3.1.3 (a) Late delivery by seller

Let us use a practical example of a Company from St. Vincent called “Vinceyfruits Ltd.” which exports 1,000 boxes of oranges to a Canadian company called “Canfruits Ltd.” Since both St. Vincent and Canada are parties to the CISG, the contract is governed by same. One of the terms of the agreement is that Canfruits Ltd. will accept delivery of the oranges at the port of Kingstown, Quay 7 at 11.30 am on 5 May 2008. On that date, Canfruits Ltd. would arrange to place the 1,000 boxes of oranges on the ship “Tropical Fruit S/S” for onward journey to Canada. The breakdown of one of Vinceyfruits Ltd. trucks causes the delay of the delivery of oranges at Quay 7. The oranges actually arrive at the port at 1.00 pm instead of 11.30 am on 5 May 2008. By that time “Tropical Fruit S/S” has already set sail to Canada. In order for Canfruits Ltd. (buyer) to avoid the contract they would have to prove that the failure by Vinceyfruits Ltd. (seller) to deliver the 1,000 boxes of oranges amounted to a fundamental breach of the contract.⁴⁶³

In practice, it is frequently held that the mere delay in delivery does not constitute a fundamental breach.⁴⁶⁴ Such a principle was clearly enunciated in the *District Court (Landgericht) München* (Germany).⁴⁶⁵ In that case it was stated:

⁴⁶² Ibid.

⁴⁶³ Article 49 (1)(a) of the CISG:

“The buyer may declare the contract avoided:

- (a) **if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or**
- (b) in the case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.”

⁴⁶⁴ Chengwei Liu, “The Concept of Fundamental Breach – Perspectives from the CISG, UNIDROIT Principles and PECL and case law,” 2nd ed. This article is available at:

<http://cisgw3.law.pace.edu/cisg/biblio/liu8.html#ccv>

⁴⁶⁵ 20 February 2002 [10 O 5423/01]. This case is available at:

<http://cisgw3.law.pace.edu/cases/020220g1.html#cx>

“Mere non-delivery after the delivery deadline does not constitute a substantial breach of contract within the meaning of Art. 49 (1) (a) CISG...The failure to meet a delivery deadline cannot, as a rule, be regarded as a fundamental breach of contract within the meaning of Art. 25 CISG...”

In arriving at such a decision, the Court took into consideration article 47 (1) of the CISG which gives some discretion on the buyer to fix an “additional” time period of “reasonable length” for performance by the seller of his obligations.⁴⁶⁶ Thus, if mere non-delivery after a deadline date amounted to a fundamental breach of the contract, the discretion of a buyer to fix an additional time period to deliver under article 47 (1) would be superfluous.

The general rule, that mere delay does not *per se* constitute a fundamental breach, would not apply in situations where at the time of the formation of the contract it was obvious that the seller and the buyer had an interest in punctual delivery.⁴⁶⁷ For example if the parties, expressly stipulated in their contract a clause stating that time is “of the essence” or used customary terms such as “fixed”, “absolutely”, “precisely” or “at the latest”.⁴⁶⁸ Thus, if Vinceyfruits and Canfruits Ltd. expressly agreed that time was of the essence and that delivery was to take place at 11.30 am “latest”, then it is quite arguable that a delivery after that time period would be considered a fundamental breach under article 25 of the CISG. In fact, the very nature of oranges as a perishable good can also be used to support the argument that time was of the essence and that the late delivery amounted to a fundamental breach. As indicated above, much depends on the circumstances of the case. For instance a late delivery of a few hours may not

⁴⁶⁶ Article 47 (1) is also incorporated in article 49 (1) (b).

⁴⁶⁷ Supra. Chengwei Liu, “The Concept of Fundamental Breach – Perspectives from the CISG, UNIDROIT Principles and PECL and case law,” 2nd ed. See also Judgment by Oberlandesgericht [Appellate Court] Hamburg, Germany, 28 February 1997; No. 1 U 167/95.

⁴⁶⁸ Ibid.

constitute a fundamental breach as much as a late delivery of a few days. Furthermore, in order to prove that a delay would constitute a fundamental breach, the foreseeability condition under article 25 must also be satisfied.⁴⁶⁹ That is to say, the party in breach must have foreseen that his actions would have substantially deprived the other party of what he was entitled to expect under the contract.

It should also be noted that a buyer may also avoid a contract in the case of non-delivery i.e. if the seller fails to deliver.⁴⁷⁰ In such circumstances, it has been found that final non-delivery by the seller amounts to a fundamental breach of contract unless the seller has a justifying reason to withhold its performance.⁴⁷¹ As a Tribunal once ruled- “an absolute failure to deliver the goods definitely constitutes a fundamental breach.”⁴⁷²

4.3.1.3 (b) Late Performance (payment/taking delivery) by the buyer:

If a buyer delays in making a payment, the issue to be decided is whether such a failure amounts to a fundamental breach under article 64.⁴⁷³ Again, it is generally acknowledged that late payment does not amount by itself to a fundamental breach.⁴⁷⁴ In the circumstances, delay on payment by the buyer cannot be the cause of immediate avoidance of the contract.⁴⁷⁵ Accordingly, only in an *exceptional* case should a delay in payment by itself amount to a fundamental breach of contract.⁴⁷⁶ For e.g. the Supreme

⁴⁶⁹ Ibid.

⁴⁷⁰ Article 49 (1) (b) of the CISG.

⁴⁷¹ Supra. Chengwei Liu, “The Concept of Fundamental Breach – Perspectives from the CISG, UNIDROIT Principles and PECL and case law,” 2nd ed.

⁴⁷² See Judgment of ICC Arbitration Case No. 9978 of March 1999; available at: <http://www.cisg-online.ch/cisg/urteile/708.htm>

⁴⁷³ Article 64 (1):

“The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract...”

⁴⁷⁴ Supra. Chengwei Liu, “The Concept of Fundamental Breach – Perspectives from the CISG, UNIDROIT Principles and PECL and case law,” 2nd ed.

⁴⁷⁵ See Judgment of ICC Court of Arbitration Paris No.7585/1992; available at <http://www.unilex.info/case.cfm?pid=1&do=case&id=134&step=FullText>

⁴⁷⁶ Stoll in “Commentary on the UN Convention on the International Sale of Goods (CISG)”; Schlechtriem ed.; Munich (1988); p. 1.

Court of Queensland in Australia ruled that the refusal by a buyer to establish a timely letter of credit was clearly a fundamental breach within the meaning of Article 25 and Article 64(1) (a) of CISG.⁴⁷⁷

With respect to the delay in taking delivery, it has also been accepted that such a delay would not constitute a fundamental breach.⁴⁷⁸ This is especially so when such a delay comprises only a few days.⁴⁷⁹ This was the view of the French *Cour d'appel* (Appeal court) which ruled that a few days' delay in taking delivery by the buyer would not constitute a fundamental breach.⁴⁸⁰ It is even believed that in cases of a longer delay, which results in considerable storage costs, the seller should still not be entitled to declare the contract avoided. In that case, the remedy which should be available to the seller is damages.⁴⁸¹ Using the same Vinceyfruits/Canfruits example, let us presume that the 1,000 boxes of oranges were delivered on time. However at the date of delivery, there were no agents of Canfruits at the docks in Kingstown to take up the delivery. The agents in fact collected the oranges the very next day. In such a scenario, Vinceyfruits (seller) may not be entitled to totally avoid the contract under article 64 (1). Vinceyfruits may however be entitled to damages for storing the oranges in the port's warehouse overnight.⁴⁸² On the other hand, if Canfruits Ltd. refuses to take delivery of the oranges for no apparent or legitimate reason, then it is very arguable that such conduct would amount to a fundamental breach.⁴⁸³

⁴⁷⁷ Downs Investment v. Perwaja Steel; Civil Jurisdiction No. 10680 of 1996. Case is available at: <http://cisgw3.law.pace.edu/cases/001117a2.html>

⁴⁷⁸ Supra. Chengwei Liu, "The Concept of Fundamental Breach – Perspectives from the CISG, UNIDROIT Principles and PECL and case law," 2nd ed.

⁴⁷⁹ Ibid.

⁴⁸⁰ Sarl Ego Fruits v. Société La Verga, 4 February 1999; No. RG 98/0270. Case is available at: <http://cisgw3.law.pace.edu/cases/990204f1.html>

⁴⁸¹ Supra. Chengwei Liu, "The Concept of Fundamental Breach – Perspectives from the CISG, UNIDROIT Principles and PECL and case law," 2nd ed

⁴⁸² See articles 74 and 85 of CISG which deal with damages and preservation of goods respectively.

⁴⁸³ Supra. Chengwei Liu, "The Concept of Fundamental Breach – Perspectives from the CISG, UNIDROIT Principles and PECL and case law," 2nd ed

4.4 FINAL ANALYSIS

This Chapter commences by providing some insight into how the proper law governing a contract is to be determined. The Chapter then considers the concept of the *lex mercatoria* and its impact on CARICOM countries. Chapter 4 culminates by providing some general background information on the CISG and what it sets out to achieve. Due to the scope of this dissertation, discussion was limited on some of the more relevant provisions of the CISG. Despite this limitation, the Chapter attempted to cover the general gist of the CISG and will provide informative reading for a first-time reader on the topic.

After considering the above mentioned principles, I am of the opinion that the implementation of the CISG would be beneficial to all CARICOM countries and to the region as a whole. I say this for various reasons. Firstly the membership of the CISG is diversified and covers approximately 70% of the total world trade. Most of CARICOM's major trading partners have ratified the CISG e.g. United States and countries of the European Union. As a result of this, there may even be some instances whereby CARICOM countries, by trading with these nations, may unknowingly be adopting the CISG through the 'backdoor.' Thus, if CARICOM wish to strengthen their economic ties and create a niche in the global trading arena, they ought to ratify and bring the Convention into force.

Secondly, the CISG provides a uniform and comprehensive code on international contracts which is familiar to both common law and civil law jurisdictions within CARICOM. Lastly, the CISG is very flexible in that parties have the autonomy to exclude its application or even vary the effect of any of its provisions.⁴⁸⁴

I therefore am of the view that the implementation of the CISG provides the window of opportunity for CARICOM to become not only a regional force, but an international force, which is able to adapt and compete within the international market. It is therefore time for CARICOM leaders to think outside the proverbial box and look

⁴⁸⁴ See article 6.

at the bigger international picture of world trade. The other CARICOM countries must follow in the footsteps of their brothers and sisters in St. Vincent and bring the CISG into force.

As more CARICOM countries sign on to the CISG and trade disputes arise under the Revised Treaty, the CCJ will also be faced with the additional role of interpreting and applying this international Convention. This indeed will be the ultimate test of the CCJ as an international tribunal.

BIBLIOGRAPHY

A. Books

CARICOM Secretariat 'CARICOM: Our Caribbean Community An Introduction'

Duke E. Pollard, 'The Caribbean Court of Justice – Closing the Circle of Independence' (The Caribbean Law Publishing Company Ltd., Kingston, 2004)

CARICOM Secretariat 'The Caribbean Court of Justice- Issues and Perspectives (2001) Vol. 1'

'Caribbean Organisation of Tax Administrators Newsletter' Issue No. 32 January to June 2007 (ISSN 1024-7017)

Delano Franklyn (edited by), 'We Want Justice- *Jamaica and the Caribbean Court of Justice*' (Ian Randle Publishers, 2005)

'Ministry of Foreign Trade and International Cooperation (MOFTIC)' Digest 2006, Issue No. 1 (Guyana)

'Caribbean Court of Justice- What it is What it does' (Prepared by Duke Pollard, Legal Consultant for the Caribbean Community Secretariat- April 2000)

Halsbury's Laws of England (4th ed.), Vol. 9

Halsbury's Laws of England (4th ed. Reissue), Vol. 9(1).

Halsbury's Laws of England (4th ed.), Vol. 41

Cheshire, Fifoot & Furmston, 'Law of Contract' 13th ed. (Butterworths)

B. Articles/Papers/Reports

Eric Green, 'Inter-American Official Hails International Support for Haiti' (6 July 2006).

<http://www.america.gov/st/washfile-english/2006/July/200607061130371xeneerg0.9372827.html>

‘APPENDIX C -- Islands of the Commonwealth Caribbean: The Caribbean Community and Common Market’

http://lcweb2.loc.gov/frd/cs/caribbean_islands/cx_appnc.html

Mr. Earl Huntley, ‘The Treaty of Basseterre and the OECS Economic Union’ (Paper No. OECS/AUT/03/38/17)

http://www.sice.oas.org/ctyindex/OECS/Treaty_e.pdf.

‘CARICOM Report: Integration and Regional Programs Department’

http://www.iadb.org/intal/aplicaciones/uploads/publicaciones/i-CARICOM_Report_1.pdf

United Nations Economic Commission for Latin America and the Caribbean Report, ‘The impact of Trade Liberalization and Fluctuations of Commodity Prices on Government Finances: The case of St. Lucia’ (Port of Spain Trinidad and Tobago, November 1999).

<http://www.eclac.org/publicaciones/xml/1/10021/carg0586.pdf>

James Moss Solomon, ‘How to do business in the Caribbean Community’

<http://www.acs-aec.org/Documents/~Calendar%202007/8th%20Business%20Forum/6%20How%20to%20Do%20Business%20in%20CARICOM%20eng.doc>

Andrew Carmona, ‘CARICOM and Washington Commission a New Chapter in U.S.-Caribbean Relations’ (27 July 2007)

<http://www.coha.org/2007/07/27/caricom-and-washington-commission-a-new-chapter-in-us-caribbean-relations/>

R. Viswanathan, ‘Caribbean: A place under the sun for Indian business’ (24 April 2007)

<http://www.thehindubusinessline.com/2007/04/24/stories/2007042400580800.htm>

CSME Unit Trinidad and Tobago, ‘History of the CARICOM Single Market and Economy’

<http://www.csmett.com/content2/csme/history/csme.shtml>

Duke E. E. Pollard, ‘The CCJ and the CSME’

<http://www.caribbeancourtsofjustice.org/speeches/pollard/01-The%20CCJ%20and%20the%20CSME.pdf>

Edwin W. Carrington, 'The Challenges of Globalisation: The CARICOM Response- The CSME, The Caribbean Court of Justice and the Role of Public Servants within the Process' - Caribbean Court of Justice- Issues and Perspectives (2001) Vol. 1

Norman Girvan, 'Towards a Single Economy and a Single Development Vision' (University of the West Indies)

http://www.oas.org/Conferenceonthecaribbean/Portals/0/Documents/General/Girvan_Towards_SEconomy_Final.pdf

'Background to Negotiations on CARICOM Canada Trading Arrangements' Caribbean Regional Negotiating Machinery (2005)

http://www.crnrm.org/psbackground_caricom-canada.htm

'Canada-Caribbean Community Free Trade Negotiations' Foreign Affairs and International Trade Canada

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/caricom.aspx>

Mario Osava, 'Challenges 2007-2008: Mercosur Limpes Slowly Along.'

<http://www.webcitation.org/5Ubfvj2vn>

'CARICOM-MERCOSUR Private Sector Trade Note (Final)' (5 December 2006)

http://www.crnrm.org/documents/private_sector/CARICOM-Mercosur_trade_note.pdf

Keith S. Sobion Esq. 'The Role of Legal Education in Preparing for a Final Court of Appeal' - The Norman Manley Law School, Mona, Kingston, Jamaica (1 March 2007)

Duke E. Pollard, 'The Caribbean Court of Justice in Regional Economic Development.' - Caribbean Court of Justice- Issues and Perspectives (2001) Vol. 1

Céline Abramschmitt, 'Is Barbados Ready for Same-Sex marriage?: Analysis of Legal and Social Constructs'

<http://sta.uwi.edu/conferences/salises/documents/Abramschmitt%20C.pdf>

The Hon. Mr. Justice Hayton, 'The Role of the Caribbean Court of Justice: An Overview'

<http://www.caribbeancourtjustice.org/speeches/hayton/The%20Role%20of%20the%20C%20C%20J%20%20Mark%20II.pdf>

The Hon. Madame Justice Désirée Bernard, 'The Caribbean Court of Justice and its relationship with the CARICOM Single Market'

<http://www.caribbeancourtjustice.org/speeches/bernard/05-The%20CCJ%20%20the%20CSME.pdf>

Sheldon A. McDonald, 'Signposts to the Development of Judicial Institutions in the Caribbean Community: The Referral Procedure of the Agreement Establishing the Caribbean Court of Justice'- Caribbean Court of Justice- Issues and Perspectives (2001) Vol. 1

Dr. Beda Wortmann, 'Choice of Law by Arbitrations: The Applicable Conflict of Laws System' (1998) 14 Arb. Int 97

Professor RH Christie and Mr. Offah Obale, 'The Law Governing an International Construction Contract' [2007] ICLR 343.

Steven E. Sachs, 'From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'' (Yale University Law School)

Professor Dr. Klaus Peter Berger, LL.M., 'The New Law Merchant and the Global Market Place: A 21st Century view of Transnational Commercial Law' (Centre for Transnational Law (CENTRAL), University of Cologne, Germany)

David W. Rivkin, 'Enforceability of Arbitral Awards based on Lex Mercatoria', Arbitration International, Volume 9, No. 1

John Felemegas, 'The United Nations Convention on Contracts for the International Sale of Goods: Article 7 and Uniform Interpretation'

Charl Hugo, 'The United Nations Convention on the International Sale of Goods: Its Scope of Application from a South African Perspective' (University of Stellenbosch) (1999) 11 SA Merc LJ pg. 1

Lisbeth Bach Christiansen, 'CISG- what risks does it involve to the seller and how does he secure against them? - a practical guide' (University of Cape Town).

RH Christie, 'Our Law of Contract and the Modern Lex Mercatoria'- Essays in Honour of AJ Kerr

Joseph Lookofsky, 'The 1980 United Nations Convention on Contracts for the International Sale of Goods: Article 25: Avoidance and Fundamental Breach.' (excerpt).

<http://cisgw3.law.pace.edu/cisg/biblio/loo25.html>

Chengwei Liu, "The Concept of Fundamental Breach – Perspectives from the CISG, UNIDROIT Principles and PECL and case law," 2nd ed.

<http://cisgw3.law.pace.edu/cisg/biblio/liu8.html#ccv>

Stoll in “Commentary on the UN Convention on the International Sale of Goods (CISG)”; Schlechtriem ed.; Munich (1988); p. 1.

C. Newspaper and other Media Articles

‘Suriname aiming to become CARICOM’s top producer’ (CARICOM Blog/CARICOM Net News- posted 12 August 2007)

Paul Kirby, ‘EU races for ex-colony trade deal’ (19 November 2007)

‘Caribbean leads partnership pact between Europe, ACP’ Daily Observer newspaper, Jamaica (30 January 2008)

‘Suriname introduces CARICOM Passport’ Caribbean Net News (12 January 2005)

‘CARICOM Summit- Haiti welcomed back,’ Jamaica Gleaner Newspaper (5 July 2006)

‘Montserrat making CARICOM Single Market pitch’ CANA news (14 December 2007)

‘Full free movement of Caribbean nationals by the year 2009’ Jamaica Gleaner Newspaper (16 February 2007)

‘Antigua approves free movement of CARICOM nationals’ Antigua and Barbuda net (18 October 2007)

‘Cabinet approves CSME competition commission and competition legislation’ Caribseek Caribbean News (27 July 2007)

‘Caribbean Single Market and Economy promotes competitiveness’ (CARICOM blog)

‘Caricom Competition Commission Inaugurated’ (CARICOM blog)

‘Cuba and Caribbean Countries Mark Anniversary of Relations’ (CARICOM blog)

‘35 years of fruitful friendship’ Barbados Nation Newspaper (12 December 2007)

‘Cheaper beef from Costa Rica’ Trinidad and Tobago Guardian Newspaper (1 August 2007)

‘CARICOM Canada talks to start by year end’ Trinidad and Tobago Guardian Newspaper (24 July 2007)

‘Profile: Mercosur- Common Market of the South’ (BBC news 29/1/08)

‘President of Brazil to Visit on Wednesday’ Jamaica Information Service (7 August 2007)

‘Chavez in Caribbean Oil Meeting’ (BBC news 6/9/05)

‘PM urges CARICOM to embrace PetroCaribe Agreement’ Jamaica Information Service

Kiraz Janicke, ‘Venezuela attends 4th Annual PetroCaribe Summit in Cuba’ Venezuelanalysis.com (23 December 2007)

‘Chavez to T&T: Join PetroCaribe’ Trinidad and Tobago Guardian Newspaper (27 December 2007)

‘Chavez says there’s role for Trinidad in PetroCaribe’ (CARICOM blog)

‘Trinidad will not sign on PetroCaribe’ Jamaica Gleaner Newspaper (4 January 2008)

Wendella Davidson, ‘Parliament unanimously approves CCJ legislation’ Guyana Chronicle (5 November 2004)

‘TCL files action in Caribbean Court of Justice over CET waiver’ Starbroek news (15 April 2008)

D. Presentations

Rt. Hon. Mr. Justice de la Bastide, President of the Caribbean Court of Justice, ‘The Caribbean Court of Justice as a Regional Court,’ paper presented to Central American Court of Justice at Managua, Nicaragua, 4-5 October 2007

H.E. Jerry Narace, ‘Presentation by H.E. Jerry Narace Ambassador Extraordinary and Plenipotentiary and Head CSME Unit to the Tobago House of Assembly on The CARICOM Single Market and Economy’ (7 December 2005)

‘Address by His Excellency Jerry Narace, Ambassador Extraordinary and Plenipotentiary Head, CSME Unit’ (22 March 2007)

Leela Ramoutar-Narinesingh, 'Status of Implementation of the CARICOM Single Market and Economy' Presentation at the Caribbean Annual Private Sector Meeting 10 June 2006, Bridgetown, Barbados

Dr. Marion Williams, 'Exchange Control Liberalisation and Capital Market Development' Presentation at Sherbourne Conference Centre, Barbados, 5 May 2005

H.E. Jerry Narace, 'Presentation to the 21st Annual Conference of CANTO held in St Kitts on 19th-22nd June, 2005: at the 21st Annual Conference of CANTO'

H.E. Jerry Narace, 'Presentation by His Excellency Jerry Narace Ambassador Extraordinary and Plenipotentiary and Head CSME Unit at Crowne Plaza, Port of Spain, Trinidad on 19 September 2007.'

.